

# Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence

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*Griffin v. California holds that the Fifth Amendment privilege against compelled self-incrimination prohibits a prosecutor from arguing that a defendant's failure to testify supports an inference of guilt. In the four decades since Griffin was decided, Griffin's doctrinal underpinnings have been strongly criticized by prominent jurists and commentators, and even Griffin's contemporary defenders struggle to place the constitutional prohibition of adverse comment on defendant silence within a coherent doctrinal framework.*

*In light of these largely unanswered criticisms, this Article posits that the current Fifth Amendment-based prohibition of adverse comment is untenable and must be recast in a more narrowly tailored form. Relying on a fairness rationale implicit in existing case law, this Article constructs a limited Fifth Amendment prohibition of adverse comment on defendant trial silence and suggests a mechanism by which this tailored constitutional prohibition could be implemented.*

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## INTRODUCTION

The Fifth Amendment commands that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>1</sup> Loosely characterized as the privilege against self-incrimination, this constitutional right has, of necessity, continually evolved to keep pace with an ever-changing American criminal justice system.<sup>2</sup> Not surprisingly, each evolution has been accompanied by controversy.<sup>3</sup>

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<sup>1</sup> U.S. CONST. amend V.

<sup>2</sup> See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2660 (1996) (describing how the “[l]awyerization” of criminal trials in the nineteenth century led “to a changed ideology of criminal procedure—one in which the dignity of defendants lay not in their ability to tell their stories fully, but rather in their ability to remain passive”); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93

A particularly contentious innovation in Fifth Amendment jurisprudence arose in the 1965 case of *Griffin v. California*, where the Supreme Court held that the privilege against self-incrimination prohibits a prosecutor from arguing that a defendant's failure to testify supports an inference of guilt.<sup>4</sup> Despite enduring controversy, this landmark constitutional decision has become "an essential feature of our legal tradition,"<sup>5</sup> strictly limiting jury argument and instruction in state and federal criminal trials.<sup>6</sup> Decades after

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MICH. L. REV. 857, 859–60 (1995) (highlighting the "enormous amount of modern criminal law enforcement [that] has been shaped by the Self-Incrimination Clause, as (mis)construed over the years"); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1084 (1994) ("[a]cross the centuries the privilege against self-incrimination has changed character profoundly"); *see also infra* Part I.

<sup>3</sup> Amar & Lettow, *supra* note 2, at 858 (contending that "[t]he Supreme Court's interpretation of the Fifth Amendment is currently in a jumbled transitional phase" and that the privilege "continues to confound and confuse"); Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 133–34 (2002) (arguing that Fifth Amendment jurisprudence is "universally recognized to be a hopeless muddle" and contending that "judicial attempts to determine [the amendment's] scope in a principled fashion cannot succeed"); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 908 (1999) ("[S]elf-incrimination doctrine is . . . characterized by an inconsistent combination of difficult-to-justify broad rules and a hodgepodge of miscellaneous exceptions.").

<sup>4</sup> 380 U.S. 609, 615 (1965). In the 1943 case of *Johnson v. United States*, the Supreme Court implied in dicta that adverse comment upon privileged silence would be inconsistent with "the requirements of fair trial." 318 U.S. 189, 196 (1943). Taking up this question more formally four years later in *Adamson v. California*, however, the Court held that adverse comment on a defendant's trial silence did not violate any constitutional right to a fair trial. 332 U.S. 46, 57–58 (1947); *see infra* Part I.C. In its opinion, the Court emphasized that *Johnson* was decided under a federal statute and not any provision of the Constitution. *Adamson*, 332 U.S. at 50 n.6.

<sup>5</sup> *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

<sup>6</sup> Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 842 (1980) (arguing that "the *Griffin* rule has seriously restricted state flexibility in trial procedure and has impaired the effective operation of the criminal system"); *see also* Amar & Lettow, *supra* note 2, at 865 (1995) (characterizing *Griffin* as "controversial"); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 334 (1991) (defending *Griffin*, but recognizing that the decision has been "controversial"). In addition to the obvious limitations on argument created by *Griffin*, the case has spawned an extensive body of law that attempts to draw the sometimes fine line between permissible characterizations of the evidence and impermissible comments on the failure of the accused to testify. *See Prosecutorial Misconduct*, 33 GEO. L.J. ANN.

*Griffin*, Supreme Court Justices openly criticize the case as a “wrong turn” in constitutional jurisprudence,<sup>7</sup> with one current Justice yearning for an opportunity to overrule the decision.<sup>8</sup> Commentary has been equally derisive.<sup>9</sup>

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REV. CRIM. PROC. 550, 553 n.1796 (2004) (collecting cases). For example, “[a] prosecutor’s comment that the government’s evidence is uncontradicted or unrebutted” violates the Fifth Amendment “if the only person who could have rebutted the evidence was the defendant.” *United States v. Mietus*, 237 F.3d 866, 871 (7th Cir. 2001); *see also* *United States v. Mulder*, 273 F.3d 91, 109 (2d Cir. 2001) (same).

<sup>7</sup> *See* *Mitchell*, 526 U.S. at 331–36 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas and O’Connor, JJ.); *see also* *Portuondo v. Agard*, 529 U.S. 61, 72 n.3 (2000) (Scalia, J., with Rehnquist, O’Connor, Kennedy, and Thomas, JJ.) (criticizing analysis in *Griffin* as employing “a questionable manner of constitutional exegesis” and “rel[ying] upon” a “shak[y] proposition”); Chris Blair, *Yes, Virginia, There Is a United States Constitution: Selected Criminal Law and Criminal Procedure Cases from the Supreme Court’s 1998–99 Term*, 35 TULSA L.J. 547, 560 (2000) (noting that “[f]our members of the Court are clearly dissatisfied with *Griffin* and *Carter* and do not think that the ban on adverse inference can be supported by the Constitution”).

<sup>8</sup> *Mitchell*, 526 U.S. at 343 (Thomas, J., dissenting) (“I would be willing to reconsider *Griffin* . . . in the appropriate case.”).

<sup>9</sup> *See* Ayer, *supra* note 6, at 869–70 (arguing that “*Griffin v. California* is untenable as an article of fifth amendment jurisprudence” and created “a rule without any reasoned justification that has nonetheless stood as a restraint on criminal prosecution for fifteen years”); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 887–90 & n.127 (2008) (noting the “widespread recognition of *Griffin*’s questionable historical and constitutional underpinnings”); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 700 (1968) (criticizing *Griffin* as giving “inadequate weight to the language of the [Fifth] amendment that testimony must be ‘compelled’”); Green, *supra* note 3, at 155–56 (criticizing the judicial prohibition of adverse comment on the ground that it fails to recognize the complex cost-benefit calculus of both trial silence and testimony); R. Kent Greenawalt, *Silence As a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 58 (1981) (criticizing *Griffin* doctrine on the ground that “[n]either the jurors’ drawing of natural inferences in the attempt to figure out where the truth lies, nor the judge’s comment about inferences that may naturally be drawn is a penalty” under the ordinary meaning of the word); Adam H. Kurland, *Prosecuting Ol’ Man River: The Fifth Amendment, The Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841, 875 n.111 (1990) (“The *Griffin* rule has been criticized persuasively as illogical and not justified by any legitimate policy rationales underlying the fifth amendment.” (citing Ayer, *supra* note 6, at 849)); John. H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21 (1978) (contending that “*Griffin v. California* . . . exaggerated the privilege [against self-incrimination] to senseless lengths”); Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1339, 1349 (2009) (arguing that *Griffin* “ought to be abandoned”

*Griffin* condemns adverse (i.e., negative) prosecutorial or judicial comment on a defendant's refusal to testify as an unconstitutional "penalty" on a Fifth Amendment right. Jurists and commentators have criticized this reasoning on the ground that adverse comment constitutes a relatively minor penalty differing in degree and kind from the species of compulsion outlawed by the Fifth Amendment.<sup>10</sup> In addition, critics point out that the Supreme Court has allowed a long list of penalties to be imposed upon a refusal to incriminate oneself, many of which appear to be at least as severe as the adverse comment *Griffin* forbids.<sup>11</sup>

In light of these largely unanswered criticisms, courts and commentators have struggled to place *Griffin* and its progeny within a coherent doctrinal

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because the rule it sets forth "makes little sense as a matter of constitutional law" and "cannot be justified in terms of the text or history of the Self-Incrimination Clause"); Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 302-03 (1988) (criticizing Supreme Court's doctrine on ground that *Griffin*'s penalty analysis is not consistently applied in other contexts (citing Geoffrey Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 146 n.241, for similar criticism)).

<sup>10</sup> See, e.g., *Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting) (contending that the prohibition of adverse comment arose in Supreme Court case law "[d]espite the text" of the Fifth Amendment); *Griffin*, 380 U.S. at 620 (Stewart, J., dissenting) (asserting that any compulsion created by adverse comment "is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee"); Anne Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 236 (1984) (critiquing the rationale articulated in *Griffin* on the ground that the burden highlighted by the Court is "arguably slight because the jury would observe the failure to testify even without the prosecution's encouragement"); Sampsell-Jones, *supra* note 9, at 1347 ("The threat of an adverse inference, which is after all a relatively trivial penalty compared to torture or contempt, does not constitute compulsion.").

<sup>11</sup> See Ayer, *supra* note 6, at 847 ("the Court permits imposition of other burdens on defendants' privilege to remain silent that are as great or greater than the burden imposed in *Griffin*"); Mark Berger, *Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence*, 22 AM. J. CRIM. L. 391, 426 (1995) (noting that "American law recognizes that the decision to remain silent is not necessarily cost-free" and that "[i]n numerous situations the courts have upheld the imposition of penalties that have been applied to individuals who asserted their privilege against self-incrimination"); Michael J. Hunter, *The Man on the Stairs Who Wasn't There: What Does a Defendant's Pre-Arrest Silence Have to Do with Miranda, The Fifth Amendment, or Due Process?*, 28 HAMLINE L. REV. 277, 300 (2005) (arguing that application of the no-penalty "rationale contradicts, without any explanation, the Court's consistent admonitions that not every constitutional choice made by a defendant, comes pain free"); see also *infra* Part II.A (discussing Supreme Court case law upholding various penalties for otherwise-protected silence).

framework.<sup>12</sup> This Article takes up that challenge, seeking to reconceptualize the constitutional prohibition of adverse comment, and thereby place it on the firm doctrinal footing necessary for such a sweeping intrusion into state and federal criminal procedure. The Article concludes that the Fifth Amendment can be construed to prohibit adverse comment, but only if the prohibition's scope is narrowed.

As explained in more detail in the discussion to follow, in a certain subset of cases, adverse comment so exacerbates the plight of the silent defendant that it transforms a sharp-elbowed trial tactic into something akin to the compulsion to testify forbidden by the Fifth Amendment.<sup>13</sup> In these cases, including most prominently the large number of trials where a defendant declines to testify to avoid the introduction of his prior criminal convictions, adverse comment is both: (i) unfair (in that it urges the jury to adopt a false and essentially un rebuttable inference of guilt from silence),

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<sup>12</sup> *McKune v. Lile*, 536 U.S. 24, 53–54 (2001) (O'Connor, J., concurring) (criticizing the Court's "failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination" in separating constitutional from unconstitutional penalties for silence); Alschuler, *supra* note 2, at 2628 n.11 (arguing that "[t]he majority's reliance on the doctrine of unconstitutional conditions in *Griffin* was unnecessary" and suggesting that the Court could alternatively have argued that adverse comment creates a situation where the defendant either testifies against herself by her silence or by her testimony); Ayer, *supra* note 6, at 866 (noting that legal scholars have long been "on the lookout for an alternative rationale for the *Griffin* rule"); Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1348 n.165 (2001) (stating that in *Griffin* the Court "[a]rguably . . . employed the [unconstitutional conditions] doctrine to invalidate conditions imposed on the Fifth Amendment privilege" but suggesting that the *Griffin* rule "is best explained" as stated in Alschuler, *supra* note 2, at 2628 n.11); Lissa Griffin, *Is Silence Sacred? The Vulnerability of Griffin v. California in a Terrorist World*, 15 WM. & MARY BILL RTS. J. 927, 928–29 (2007) (highlighting the vulnerability of the prohibition of adverse comment in light of changes to the membership of the Supreme Court, the recent "U.S. experience with terrorism" and "the uncertain mooring of the privilege doctrinally"); Kurland, *supra* note 9, at 875 n.111; Sampsell-Jones, *supra* note 9, at 1343 (critiquing Supreme Court's prohibition of adverse comment on the ground that it has failed to articulate "some theory to explain which conditions are constitutionally acceptable and which are not"); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 490 (2000) (arguing that "the traditional rationales for the self-incrimination privilege do not adequately explain the *Griffin* doctrine"); Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 155 (2001) (noting that there "does not appear to be a clear answer" in the case law separating impermissible burdens, like that in *Griffin*, from burdens deemed permissible in other cases).

<sup>13</sup> See *infra* Part IV.A.

and (ii) a penalty imposed on the defendant's refusal to incriminate himself.<sup>14</sup> This combination of a particularly severe penalty for silence and a desire to avoid self-incrimination satisfies the necessary prerequisites for a Fifth Amendment violation.

For *Griffin*'s proponents, this defense of the constitutional prohibition of adverse comment comes at a price. If one accepts, as this Article contends, that a Fifth Amendment prohibition of adverse comment depends for its doctrinal viability on the unfairness<sup>15</sup> of that comment, it necessarily follows that the prohibition's scope must be narrowed. In fact, defendant-specific analysis of the constitutional implications of adverse comment highlights two broad categories of silent defendants who, although protected under current doctrine, should not be shielded from adverse comment by the Fifth Amendment.

First, many non-testifying criminal defendants, including defendants who decline to testify because they fear that the substance of their testimony will support rather than rebut the prosecution's evidence, suffer no unfairness, and consequently only a mild "penalty," when adverse comment is permitted.<sup>16</sup> For these defendants, adverse comment highlights the actual reason for the defendant's silence and parallels the harm inherent in any refusal to testify (the jury's likely assumption that guilt—or at least the absence of a convincing rebuttal—explains the defendant's silence).<sup>17</sup> While the defendant's silence may indeed be damaging, adverse comment on that silence results in a merely incremental penalty that does not approach the compulsion to testify outlawed by the Fifth Amendment. Defendants who fall into this category receive a constitutional windfall when, as under current doctrine, adverse comment is precluded.

Second, some silent defendants who do suffer unfairness from adverse comment—and thus a significant penalty—nevertheless refuse to testify for reasons that are not protected by the Fifth Amendment (e.g., to avoid

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<sup>14</sup> See *infra* Part IV.

<sup>15</sup> There are, of course, myriad forms of fairness at play in criminal trials. As the article will explain, the fairness rationale invoked here is that alluded to in *Griffin* itself—that adverse comment (in certain circumstances) urges upon the jury a misleading inference, suggesting that silence indicates guilt when, in fact, there is a compelling alternative explanation for the defendant's refusal to testify that cannot be revealed to the jurors. See *Griffin*, 380 U.S. at 614–15.

<sup>16</sup> See *infra* Part IV.B.

<sup>17</sup> See *infra* Part IV.B.

incriminating a third party).<sup>18</sup> Again, these defendants enjoy a windfall when adverse comment is prohibited under a constitutional provision that has no application to their circumstances.

Other commentators have recognized fairness (or a related reliability concern) as a potential justification for a prohibition of adverse comment, but have couched this justification in generic policy terms—i.e., that the unfairness of adverse comment itself warrants its preclusion.<sup>19</sup> Indeed, similar concerns are obliquely alluded to in *Griffin* itself.<sup>20</sup> These naked policy arguments, however, support only a *statutory* prohibition of adverse comment, akin to those in effect in a majority of American jurisdictions prior

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<sup>18</sup> See *infra* Part IV.B. Significantly, this criticism applies whether or not one accepts the underlying thesis of this Article that unfairness is a necessary prerequisite of a Fifth Amendment violation in this context.

<sup>19</sup> See, e.g., Amar & Lettow, *supra* note 2, at 866 (surveying Fifth Amendment doctrine and asserting that *Griffin* “can stand” on “reliability” grounds); Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1246–47 (1996) (asserting that “Steve Schulhofer has offered the best defense of *Griffin*” by asserting that its prohibition of adverse inferences from silence protects innocent defendants “who fear taking the stand because they will be impeached by their prior criminal record and those whose nervousness, appearance, or lack of mental agility might enable a prosecutor to make them look and sound guilty through artful cross-examination”); Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the “Search For Truth” in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1285–86 (1996) (recognizing that the “problem” with overruling *Griffin* “is that as long as the main reason for a defendant not testifying is the fear of impeachment with what would otherwise be inadmissible prior convictions, it is inappropriate for the prosecutor to claim (or the jury to infer) that the defendant did not testify because of guilt”); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 678 (1991) (“So long as the law more readily allows use of prior convictions against an accused if he takes the stand than if he does not, the rule in *Griffin v. California* . . . seems almost inevitable. It is not acceptable to allow a prosecutor to encourage a jury to think that the accused stayed off the stand because he could not give credible exculpatory evidence when, in fact, the defendant was intimidated from testifying by the threat that doing so would open up his prior criminal record or otherwise expose him to character impeachment.”); cf. Sampsell-Jones, *supra* note 9, at 1355–56 (arguing for abolition of the *Griffin* rule and its replacement with a policy-based statutory regime that would prohibit adverse comment in circumstances where the “defendant will not be able to explain his decision to remain silent without revealing unfairly prejudicial information to the jury”). Sampsell-Jones’s article parallels this author’s own system-wide prescriptions designed to incentivize defendant testimony. See *id.* at 1339 & n.59 (recognizing Bellin’s 2008 article as “a recent article arguing for a similar set of proposed reforms” to those being proposed by Sampsell-Jones).

<sup>20</sup> See *Griffin*, 380 U.S. at 615.



to the *Griffin* decision. Unless placed within a Fifth Amendment rubric (as sketched out above and developed more fully in Part IV), these arguments fall short of justifying a *constitutional* prohibition. In addition, the fairness (and reliability) concerns implicated by adverse comment support only a narrowly drawn, defendant-specific prohibition of adverse comment, not the blanket prohibition that currently exists.

Thus, the implications of this Article's thesis for *Griffin*'s proponents are mixed. The good news is that a fairness rationale implicit within existing Fifth Amendment case law can be used to shore up the unstable constitutional footing of the prohibition of adverse comment. In addition, the rationale proposed here meets three criteria likely to appeal to the judiciary (the source of any future reforms): (i) it retains the current Fifth Amendment grounding for the prohibition of adverse comment;<sup>21</sup> (ii) it integrates the prohibition into the Supreme Court's existing Fifth Amendment "penalty" jurisprudence, including the otherwise anomalous treatment of adverse comment in *United States v. Robinson*;<sup>22</sup> and (iii) it heeds the constitutional text, explaining why adverse comment can (in certain circumstances) be analogized to being "compelled" to testify. The bad news, of course, is that

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<sup>21</sup> The proposed rationale, which emphasizes fairness and case-by-case analysis, would also fit comfortably in a due process (i.e., "fair trial") framework. If the Supreme Court were proceeding on a clean slate, this might indeed be the most advisable doctrinal cure for its ailing jurisprudence. The Court is not operating on a clean slate, however. The Court squarely rejected the claim that due process prohibits adverse comment in *Adamson v. California*, 332 U.S. 46, 54 (1947), and reaffirmed this holding in *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The Court has similarly set a high bar for defendants invoking due process to challenge permissive inferences urged upon the jury. See *County Court v. Allen*, 442 U.S. 140, 157 (1979) (holding that jury inferences violate due process only "if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference"). In concert with the Supreme Court's explicit grounding of the existing prohibition of adverse comment in the self-incrimination clause, the Court's cases interpreting the Due Process Clause likely foreclose any due process rationale for a prohibition of adverse comment. Cf. *Portuondo*, 529 U.S. at 74 (explaining that to the extent a Fifth Amendment claim overlaps with a Fourteenth Amendment due process claim, it should be analyzed under the Fifth Amendment, and citing prior case law for the proposition that "where an Amendment 'provides an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing [the] claims'" (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989))). In any event, a defensible rule anchored in the Due Process Clause would be similar, if not identical, to the rule proposed here under a Fifth Amendment, compelled self-incrimination rationale.

<sup>22</sup> 485 U.S. 25, 32 (1988) (holding that adverse comment is permissible "where . . . the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel").

the rationale, and underlying analysis, exposes the substantial overbreadth of the existing constitutional prohibition of adverse comment.

The argument is presented in four interrelated parts. The first part sketches the historical background of the prohibition of adverse comment, a prohibition enforced exclusively by statute until the 1965 *Griffin* decision. Part II endorses the two primary critiques of the constitutional rule announced in *Griffin*: (i) that adverse comment cannot, as a general matter, be analogized to the compulsion forbidden by the Fifth Amendment; and (ii) that *Griffin* is inconsistent with the Supreme Court's other Fifth Amendment "penalty" jurisprudence. Part III proposes a much needed, alternative doctrinal rationale for a Fifth Amendment prohibition of adverse comment, and Part IV explores the viability and implications of the narrow prohibition of adverse comment justified by the proposed rationale.

## I. A BRIEF HISTORY OF THE PROHIBITION OF ADVERSE COMMENT IN AMERICAN COURTS

Prior to the Supreme Court's 1965 decision in *Griffin v. California*, there was no uniform American rule governing the treatment of a defendant's silence at trial. Some jurisdictions allowed adverse comment on such silence and others prohibited it. This patchwork system reflected a general understanding, supported by the history and text of the pertinent provisions of the United States Constitution, that the nation's founders had little to say on the subject, leaving the permissibility of adverse comment to be determined by state and federal legislatures.

### A. *The History and Text of the Fifth Amendment*

The absence of a constitutional prohibition of adverse comment for most of the nation's history follows quite naturally from the dearth of textual or historical support for any such constitutional prohibition.<sup>23</sup> The text of the Fifth Amendment prohibits being "compelled . . . to be a witness," implying that a person aggrieved by a violation of the textual command has either testified against her will or suffered the introduction of an involuntary out-of-court statement. Adverse comment arises, however, only when the defendant declines to testify. A defendant who sits silently at trial may have grounds to

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<sup>23</sup> Cf. Lissa Griffin, *supra* note 12, at 961 ("To the extent that the Supreme Court's support for the rule is based neither on text nor history, it has been criticized and continues to be vulnerable.").

complain about judicial or prosecutorial disparagement of her trial silence, but those grounds do not include any obvious violation of the literal command that she cannot be “compelled . . . to be a witness.”<sup>24</sup>

The historical case for a prohibition of adverse comment on a defendant’s refusal to testify is equally problematic. At the time of the enactment of the Bill of Rights, and in the decades that followed, criminal defendants were barred from testifying.<sup>25</sup> Thus, the nation’s founders could not have intended, in enacting the Fifth Amendment, to prohibit adverse comment on a defendant’s “decision” not to testify.<sup>26</sup>

In fact, the historical record suggests that, if anything, the founders would have endorsed adverse comment on defendant silence. While forbidden from testifying, criminal defendants in the founding era were invited to speak at their trials, both through a “pretrial statement” to the presiding magistrate and by functioning as their own counsel.<sup>27</sup> If the defendant, despite these opportunities, refused to personally present an

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<sup>24</sup> See *Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting) (contending that the prohibition of adverse comment arose in Supreme Court case law “[d]espite the text” of the Fifth Amendment); *Carter v. Kentucky*, 450 U.S. 288, 309 (1981) (Rehnquist, J., dissenting) (noting that “no one here claims that the defendant was forced to take the stand against his will or to testify against himself inconsistently with the provisions of the Fifth Amendment”); Ayer, *supra* note 6, at 852 (contending that the text of the amendment “would not seem, at first blush, even to remotely address the situation where a defendant does not become a witness”). See *infra* Part II, for the Court’s response to this textual argument.

<sup>25</sup> See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986) (“The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.”); *McGautha v. California*, 402 U.S. 183, 214 (1971).

<sup>26</sup> See *McGautha*, 402 U.S. at 214 (“Inasmuch as at the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf, nothing approaching [the defendant’s] dilemma [as to whether to testify] could arise.”).

<sup>27</sup> *Portuondo*, 529 U.S. at 65–67 (explaining that in 1791, “[d]efendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace detailing the events in dispute” and “typically spoke and conducted their defense personally, without counsel”); Witt, *supra* note 3, at 911 (“Pretrial questioning of the accused was the pervasive practice in the late eighteenth and early nineteenth centuries, and that evidence was often a critical part of the prosecution’s case against the accused at trial.”).

exculpatory version of events, the prosecutor could highlight the omission and invite the factfinder to draw an adverse inference.<sup>28</sup>

### *B. Federal and State Statutes Regarding Defendant Silence*

Implicitly recognizing the Constitution's silence on the question, Congress addressed the evidentiary treatment of a defendant's refusal to testify by statute in 1878. The statute's primary purpose was to "free[] the accused in a federal prosecution from his common law disability as a witness."<sup>29</sup> Reflecting concerns of criminal justice reformers of the era, however, the statute included protections for defendants who, despite their newfound freedom to testify, might "not wish to be witnesses."<sup>30</sup> In the words of the statute, the defendant could "at his own request" become "a competent witness," but "[h]is failure to make such request shall not create any presumption against him."<sup>31</sup>

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<sup>28</sup> Alschuler, *supra* note 2, at 2631 ("Until the nineteenth century was well underway, magistrates and judges in . . . America expected and encouraged suspects and defendants to speak during pretrial interrogation and again at trial. Fact finders did not hesitate to draw inferences of guilt when defendants remained silent."); Amar & Lettow, *supra* note 2, at 897–98 (explaining that at the time of ratification of the Bill of Rights, a defendant's decision to stand mute in the face of pretrial accusation "could be laid before a later criminal jury for whatever inferences they might draw" (citation omitted)); see *Mitchell*, 526 U.S. at 333 (1999) (Scalia, J., dissenting) ("The justice of the peace testified at trial as to the content of the defendant's [pre-trial] statement; if the defendant refused to speak, this would also have been reported to the jury."). Drawing on this historical evidence, Professor Alschuler argues that the Fifth Amendment "was not intended to afford defendants a right to remain silent or to refuse to respond to incriminating questions," but rather "[i]ts purpose was to outlaw torture and other improper methods of interrogation." Alschuler, *supra* note 2, at 2631. For a discussion of the complexity of the historical origins of the Fifth Amendment, see Witt, *supra* note 3, at 832–33 (describing numerous theories put forth by scholars to explain historical origins of the Fifth Amendment).

<sup>29</sup> *Bruno v. United States*, 308 U.S. 287, 292 (1939); *Wilson v. United States*, 149 U.S. 60, 66 (1893) ("In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case.").

<sup>30</sup> *Wilson*, 149 U.S. at 66; see *Ferguson v. Georgia*, 365 U.S. 570, 578 (1961) (explaining that many of those who opposed permitting defendant testimony feared that the reform "threatened erosion of the privilege against self-incrimination and the presumption of innocence").

<sup>31</sup> Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (current version at 18 U.S.C. § 3481 (2006)).

Justice Stephen Field, writing for a unanimous Supreme Court in *Wilson v. United States*, applied the statute to a prosecutor's reference in closing argument to the defendant's trial silence. The prosecutor had argued that, in contrast to the defendant, if he (the prosecutor) were ever on trial, "I will go upon the stand and hold up my hand before high heaven and testify to my innocence of the crime."<sup>32</sup> The Court held that the prosecutor's comment, together with the trial court's failure "to condemn the reference," violated the federal statute.<sup>33</sup>

In addition to applying the statute, Justice Field's opinion endorsed its wisdom, emphasizing that forbidding an adverse presumption from trial silence protected not only guilty defendants but also innocent defendants who were incapable of effectively testifying on their own behalf. In what would become a particularly significant passage, Justice Field opined that:

It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass [a defendant] to such a degree as to increase rather than remove prejudices against him.<sup>34</sup>

Foreshadowing the later development of Fifth Amendment jurisprudence in this context, the Supreme Court expanded the protections announced in *Wilson* in *Bruno v. United States*.<sup>35</sup> In *Bruno*, the Court held that the federal statute not only precluded adverse comment, but also required the district court, upon request, to instruct the jury not to consider the defendant's failure to testify in evaluating his guilt.<sup>36</sup>

Paralleling the federal model, the vast majority of the States also enacted statutory bars to adverse comment as they swept away traditional rules precluding defendant testimony. By the time the *Griffin* decision essentially constitutionalized the federal statute in 1965,<sup>37</sup> only six states permitted

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<sup>32</sup> *Wilson*, 149 U.S. at 66 (quoting words of district attorney).

<sup>33</sup> *Id.* at 68.

<sup>34</sup> *Id.* at 66.

<sup>35</sup> 308 U.S. at 294.

<sup>36</sup> *Id.* at 293.

<sup>37</sup> See *United States v. Robinson*, 485 U.S. 25, 29 n.4 (1988) (noting that while "prohibition on adverse comment concerning a defendant's failure to testify" was originally "grounded solely in" the federal statute, "the scope of the Fifth Amendment

adverse comment on a defendant's trial silence: California, Ohio, New Jersey, Iowa, Connecticut and New Mexico.<sup>38</sup>

California's rule, incorporated into the state's constitution, stated:

No person shall . . . be compelled, in any criminal case, to be a witness against himself . . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.<sup>39</sup>

In applying this rule, the California courts limited the type of adverse comment permitted. The courts permitted adverse comment or instruction only with respect to facts that were within the defendant's "power" to explain or deny, and emphasized that the defendant's refusal to testify could not substitute for a failure of proof of any element of the prosecutor's case.<sup>40</sup> While outside the mainstream of American jurisprudence, comment in this fashion was accepted by the Model Code of Evidence, and the Uniform Rules of Evidence, "endorsed by resolution of the American Bar Association and the American Law Institute, and [had] the support of the weight of scholarly opinion."<sup>41</sup>

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has been expanded to encompass in large part the terrain previously occupied" by that statute (citation omitted)).

<sup>38</sup> Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 20 n.94 (1989) ("Many states, . . . beginning with Massachusetts in 1866, forbade comment on the defendant's refusal to testify and forbade the jury to draw an inference against the defendant. . . . By the 1950s, six states still permitted comment or let the jury draw an inference."); *see also Griffin*, 380 U.S. at 611, n.3 ("The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, 'an unwarrantable line of argument.'" (citation omitted)); *Adamson v. California*, 332 U.S. 46, 55 & n.16 (1947) (stating that "[g]enerally, comment on the failure of an accused to testify is forbidden in American jurisdictions" and citing *California*, *New Jersey*, *Ohio*, and *Vermont* as states permitting adverse comment).

<sup>39</sup> *People v. Modesto*, 398 P.2d 753, 759 n.1 (Cal. 1965) (quoting CAL. CONST. art. I, § 13 (1934) (repealed 1974)); *People v. Adamson*, 165 P.2d 3, 7 (Cal. 1946) (same).

<sup>40</sup> *Griffin*, 380 U.S. at 621-22 (Stewart, J., dissenting); *Adamson*, 165 P.2d at 9-10. In addition, adverse comment was not permitted until the prosecution, "at the trial, has made out a prima facie case against [the defendant]." *People v. Talle*, 245 P.2d 633, 641 (Cal. Ct. App. 1952).

<sup>41</sup> *Griffin*, 380 U.S. at 622 (Stewart, J., dissenting) (citations omitted); *see also Lakeside v. Oregon*, 435 U.S. 333, 337 n.5 (1978) (recognizing that the practice

### C. The Due Process Challenge to Adverse Comment

For almost a century after *Wilson*, the Supreme Court had no occasion to determine whether the Fifth Amendment privilege against self-incrimination precluded adverse comment on the silence of an accused. Although rules permitting adverse comment persisted in a handful of states, the Court insisted until 1964 that the Fifth Amendment did not apply in state prosecutions.<sup>42</sup>

The Supreme Court did entertain challenges under the Fourteenth Amendment to state rules permitting adverse comment. The challengers contended that adverse comment on trial silence violated that amendment's command "by depriving [them] of their life, liberty, or property, without due process of law."<sup>43</sup> The Supreme Court resolved the most significant of these challenges in *Adamson v. California*, where it held that California's rule permitting adverse comment did not deprive defendants of due process.<sup>44</sup>

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disapproved in *Griffin* "at one time . . . enjoyed the approval of the American Law Institute and the American Bar Association" and that "instructions similar to those at issue in *Griffin* had been sanctioned by the Model Code of Evidence and the Uniform Rules of Evidence"); Ayer, *supra* note 6, at 842 n.8 ("In the years preceding *Griffin* there was significant sentiment in informed circles for allowing such comment.").

<sup>42</sup> See *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (incorporating the Fifth Amendment privilege against self-incrimination via the Fourteenth Amendment).

<sup>43</sup> See *Twining v. New Jersey*, 211 U.S. 78, 91, 99 (1908) (citing U.S. CONST. amend. XIV). The first case to resolve the question, *Twining v. New Jersey*, held that "the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." 211 U.S. 78, 114 (1908). The Court explicitly noted:

It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States.

*Id.* at 93 (citations omitted). It should also be noted that the Fifth Amendment contains a "due process" clause that has been interpreted to have the same meaning as the clause contained in the Fourteenth Amendment. Kenneth W. Gaines, *Instruct The Jury: Crane's "Serious Difficulty" Requirement and Due Process*, 56 S.C. L. REV. 291, 293 n.9 (2004) (explaining that "[c]ourts have generally interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments identically" and citing cases).

<sup>44</sup> 332 U.S. at 57–58. The Court in *Adamson* assumed for purposes of its opinion that the Fifth Amendment would have prohibited the adverse comment at issue, but suggested its disagreement with the assumption in a footnote. The Court noted that "[t]he California law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him," while "[t]he Fifth Amendment

The *Adamson* Court began its analysis by emphasizing that the rights specifically enumerated in the Fifth Amendment did not apply to the States and thus state courts (unlike their federal counterparts) were not precluded from compelling defendants to testify in criminal trials.<sup>45</sup> The Court conceded, however, that certain forms of compulsion might render a trial fundamentally unfair, and thereby violate the Fourteenth Amendment's due process guarantee.<sup>46</sup> For example, "[t]he due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion."<sup>47</sup>

In examining California's rule, the Court found nothing sufficiently unfair or coercive to violate due process. In fact, the Court stated, the inference permitted by the California rule—that the prosecution's evidence could be thought more compelling if the defendant, despite the opportunity to do so, declined to contradict it—"seem[ed] quite natural."<sup>48</sup>

Anticipating this response, the defendant in *Adamson* highlighted one aspect of California's rule as particularly unfair.<sup>49</sup> In California, as in the vast majority of American jurisdictions, criminal defendants who take the witness stand are subject to general credibility impeachment through the introduction of evidence of their criminal record. If, however, they do not testify, such evidence is ordinarily prohibited.<sup>50</sup> Given this looming threat of

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forbids compulsion on a defendant to testify." *Id.* at 50 n.6. The Court added that "[a] federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense" but emphasized that "[i]t was this statute which is interpreted to protect the defendant against comment for his claim of privilege," not the Constitution. *Id.*

<sup>45</sup> *Id.* at 54.

<sup>46</sup> *Id.* at 53 ("A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." (citations omitted)).

<sup>47</sup> *Id.* at 54.

<sup>48</sup> *Adamson*, 332 U.S. at 56; see also *id.* at 60 (Frankfurter, J., concurring) ("Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.'").

<sup>49</sup> *Id.* at 56 ("Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment.").

<sup>50</sup> The *Adamson* Court recognized that California law "forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only



impeachment, the petitioner in *Adamson* contended, “he could not take the stand to deny the evidence against him” and thus neutralize the adverse inference permitted by California law.<sup>51</sup> If he did, “he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence so produced might well bring about his conviction.”<sup>52</sup>

The Supreme Court was unmoved. The dilemma faced by a criminal defendant of either “leaving . . . adverse evidence unexplained” or “subjecting himself to impeachment through disclosure of former crimes” while “difficult” did “not seem unfair,” or, at least, was not so unfair as to constitute a denial of due process.<sup>53</sup>

#### D. *The Penalty Doctrine of Griffin v. California*

Despite its triumph in *Adamson*, the ultimate fate of the California rule permitting adverse comment was sealed in 1964. In that year, the Supreme Court (which no longer included any member of the *Adamson* majority) broke with long settled precedent to hold, in *Malloy v. Hogan*, that the Fifth Amendment applied to the States.<sup>54</sup> In addition, the Court stated in sweeping dicta that the Fifth Amendment guarantees not just freedom from traditionally prohibited forms of compulsion (e.g., torture), but “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will” and the right “to suffer *no* penalty . . . for such silence.”<sup>55</sup> Less than one year after *Malloy*, the Supreme Court finally vindicated the

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be denied or explained by the defendant.” *Id.* at 49. *Adamson* had suffered prior convictions for burglary, larceny and robbery. *Id.*

<sup>51</sup> *Id.* at 57.

<sup>52</sup> *Adamson*, 332 U.S. at 57; cf. *Bellin*, *supra* note 9, at 865 (describing how “the general prohibition of evidence of a defendant’s prior convictions as substantive evidence” combined with “a rule permitting the use of that evidence to impeach a testifying defendant” may “deter[] even innocent defendants from testifying” (citation omitted)).

<sup>53</sup> *Adamson*, 332 U.S. at 57–58; see also *id.* at 60 (Frankfurter, J., concurring) (discussing the dilemma of defendant with prior convictions at greater length, but concluding that dilemma did not violate Due Process Clause).

<sup>54</sup> 378 U.S. 1, 6–11 (1964); see *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (“In *Malloy*, we held that the Fifth Amendment’s Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States.”).

<sup>55</sup> *Malloy*, 378 U.S. at 8 (emphasis added).

California rule's detractors in the landmark decision of *Griffin v. California*.<sup>56</sup>

The Court, in an opinion by Justice Douglas, began by emphasizing the stark facts of the *Griffin* case, which allowed the prosecutor to "ma[k]e much" of the defendant's failure to testify.<sup>57</sup> The prosecutor had pointed out that the defendant was seen with the murder victim on the evening of her death and "certainly knows" what happened to her, but "has not seen fit to take the stand and . . . explain."<sup>58</sup> The trial court, then, buttressed the prosecutor's argument by instructing the jury it could take the defendant's failure to testify "into consideration as tending to indicate the truth of [the prosecution's] evidence" as to "any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge."<sup>59</sup>

Having highlighted the damaging nature of adverse comment, the *Griffin* Court next critiqued the validity of the inference such comment invited. Countering its earlier statement in *Adamson*, the Court observed that the inference of guilt from silence "is not always . . . natural or irresistible."<sup>60</sup> Contrary to the intuitive logic underlying California's rule, the Court pointed out, a defendant might decline to take the witness stand for reasons completely unrelated to guilt or innocence (for example, to preclude disclosure of criminal convictions).<sup>61</sup> In addition, the *Griffin* Court cited the venerable *Wilson* dicta that unsophisticated defendants plagued with "[e]xcessive timidity" or "nervousness when facing others" cannot "safely venture on the witness stand" even if entirely innocent.<sup>62</sup>

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<sup>56</sup> 380 U.S. 609, 615 (1965). The changing membership of the Court undoubtedly played a role in the Court's evolution from *Adamson* to *Griffin*. Justices Black and Douglas were the only two Justices who were on the Court for both *Griffin* and *Adamson*; both Justices dissented in *Adamson* and were in the majority in *Griffin*.

<sup>57</sup> *Id.* at 610.

<sup>58</sup> *Id.* at 610-11.

<sup>59</sup> *Id.* at 610.

<sup>60</sup> *Id.* at 614-15.

<sup>61</sup> *Id.* at 615 (stating that if a defendant with prior convictions declines to testify, then, "another possible inference can be drawn from his refusal to take the stand" (quoting *People v. Modesto*, 398 P.2d 753, 763 (Cal. 1965))). The defendant-with-prior-convictions argument had, in fact, constituted the primary thrust of the petitioner's appellate brief before the Supreme Court. See Brief of Petitioner-Appellant at 10-12, *Griffin v. California*, 380 U.S. 609 (1965) (No. 202), 1964 WL 81335.

<sup>62</sup> *Griffin*, 380 U.S. at 613 (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893)).

Despite its rhetorical emphasis on the prejudicial impact of adverse comment and its potentially misleading nature, the Court declined to place either of these factors in a doctrinal framework. In fact, apart from explicitly anchoring its holding in the Fifth Amendment, the balance of Justice Douglas's opinion is largely conclusory.<sup>63</sup> The opinion labels California's rule, "a remnant of the 'inquisitorial system of criminal justice,'"<sup>64</sup> and with a nod (but no citation) to *Malloy*, declares that "[c]omment on the refusal to testify" constitutes a "penalty imposed by the courts for exercising a constitutional privilege."<sup>65</sup> The opinion then concludes, without caveats of any kind, that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."<sup>66</sup>

*Griffin* left open the question of whether in addition to prohibiting adverse comment, trial courts must (as required under federal statutory law per *Bruno*)<sup>67</sup> instruct the jury not to draw any adverse inference from a defendant's trial silence. Seventeen years later, the Court answered this question in the affirmative in *Carter v. Kentucky*.<sup>68</sup> The Court also took the opportunity to reaffirm *Griffin*, explaining that the "case stands for the

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<sup>63</sup> Sampsell-Jones, *supra* note 9, at 1341 (noting that the opinion in *Griffin* "was, to put it gently, sparse" and its "legal analysis essentially consisted of two sentences"). In a recent book, Jeffrey Rosen characterizes Justice Douglas's opinions generally as "[b]reezy, polemical, and unconcerned with the fine points of legal doctrine" and asserts that "they read more like today's blog entries than carefully reasoned constitutional arguments." JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES & RIVALRIES THAT DEFINED AMERICA* 132 (2006). Rosen states that Justice Douglas, in fact, "[s]corn[ed] the constraints of constitutional text and previous legal precedents as window dressing" and "believed . . . that law was essentially politics." *Id.* at 132–33.

<sup>64</sup> *Griffin*, 380 U.S. at 614.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 615. The opinion sidesteps, without comment, the due process rationale rejected in *Adamson*. In fact, as the dissenters made clear, the petitioner in *Griffin* did not even raise a due process challenge—presumably because "[t]his Court long ago decided that the Due Process Clause of the Fourteenth Amendment does not of its own force forbid this kind of comment on a defendant's failure to testify." *Griffin*, 380 U.S. at 619 (Stewart, J., dissenting) (citing *Adamson v. California*, 332 U.S. 46 (1947), *overruled by Malloy v. Hogan*, 378 U.S. 1 (1964); *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled by Malloy*, 378 U.S. 1).

<sup>67</sup> See *supra* text accompanying note 36.

<sup>68</sup> 450 U.S. 288, 303 (1981).

proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.”<sup>69</sup>

In sharp contrast to *Griffin*, the thrust of the analysis in *Carter* consists of downplaying the significance of adverse comment. Highlighting a point raised by the dissent in *Griffin*, the *Carter* Court explained that the “penalty . . . exacted . . . by adverse comment on the defendant’s silence” may “be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant’s silence broad inferences of guilt.”<sup>70</sup> From this premise, it followed that to further minimize the pressure to testify recognized in *Griffin*, “the Fifth Amendment requires that a criminal trial judge must give a ‘no-adverse-inference’ jury instruction when requested by a defendant to do so.”<sup>71</sup>

Despite their doctrinal shortcomings,<sup>72</sup> the holdings of *Griffin* and *Carter* remain largely intact today, forming one of the defining features of American criminal trials.<sup>73</sup> In every criminal trial in America, when a defendant

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<sup>69</sup> *Id.* at 301.

<sup>70</sup> *Id.* Justice Stewart dissented in *Griffin*, but nevertheless wrote the majority opinion in *Carter*. In his dissent in *Griffin*, he criticized the majority on the ground, among others, that California’s rule might, in fact, protect silent defendants by “carefully controlling” the jury’s evaluation of trial silence. *Griffin*, 380 U.S. at 621 (Stewart, J., dissenting). Justice Stewart contrasted this with the more chaotic situation where “the jury [is] left to roam at large with only its untutored instincts [as a] guide.” *Id.*

<sup>71</sup> *Carter*, 450 U.S. at 300. The instruction erroneously rejected by the trial court in *Carter* was as follows: “‘The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.’” *Id.* at 294.

<sup>72</sup> See *infra* Part II.

<sup>73</sup> Legal systems in other countries, including England, permit adverse inferences from silence. See Lissa Griffin, *supra* note 12, at 951 (noting that English law “permits a negative inference to be drawn based on a defendant’s failure to testify at trial”); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises*, 2001 U. ILL. L. REV. 791, 825 (“[A] defendant [in France] is not informed at trial that he has the right to remain silent . . . . The tone of [questioning] to him indicates that a reply is expected, and that adverse inferences will be drawn if [he] does not answer. . . . There is no doubt that, in practice, a refusal to testify would be devastating. In the French legal culture, defendants are expected to speak . . .” (citation omitted)); Mike Redmayne, *English Warnings*, 30 CARDOZO L. REV. 1047, 1047 n.1 (2008) (noting that, in addition to the criminal justice system of England and Wales, the justice system in Singapore allows adverse inferences from trial silence); Gordon Van Kessel, *Quieting The Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 927 & n.5 (2002) (recognizing that in

declines to testify, *Griffin* prohibits adverse comment on the defendant's silence and *Carter* requires an instruction, upon request, that the jury may not consider the defendant's failure to testify for any purpose. A violation of either of these rules will generally require reversal of any conviction subsequently obtained.<sup>74</sup>

## II. THE ABSENCE OF COMPULSION IN *GRIFFIN* AND *CARTER*

The penalty rationale set forth in *Griffin* provides a plausible response to the textual problem discussed in Part I, *supra*, that a defendant exposed to adverse comment has, by definition, not been compelled to be "a witness."<sup>75</sup> A penalty imposed on protected silence can be viewed as an attempt, albeit an unsuccessful one, to compel testimony by increasing the anticipated cost of withholding that testimony. It is this effort, the Court has ruled, "regardless of its ultimate effectiveness," that violates the Fifth Amendment.<sup>76</sup>

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"England, Israel, and a few other countries . . . factfinders [are] legally permitted to draw inferences of guilt from silence during police questioning and at trial" and noting that "[t]he European Court of Human Rights has found that with certain protections such use of silence does not violate the right to a fair trial under the" European Convention on Human Rights).

<sup>74</sup> See *Fontaine v. California*, 390 U.S. 593, 596 (1968) (reversing state conviction based on *Griffin* error); *Chapman v. California*, 386 U.S. 18, 24 (1967) (holding that error under *Griffin* requires reversal unless the prosecution establishes that the error "was harmless beyond a reasonable doubt" and reversing state conviction for *Griffin* error); *United States v. Soto*, 519 F.3d 927, 930–31 (9th Cir. 2008) (error in failing to give *Carter* instruction requires reversal unless harmless beyond reasonable doubt).

<sup>75</sup> See *supra* text accompanying notes 23, 24.

<sup>76</sup> *Lefkowitz v. Cunningham*, 431 U.S. 801, 805–06 (1977) ("[T]he privilege against compelled self-incrimination could not abide any 'attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers . . .'" (quoting *Gardner v. Broderick*, 392 U.S. 273, 279 (1968))); see *Estelle v. Smith*, 451 U.S. 454, 463 (1981) ("Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.").

In dissent in *Adamson*, Justice Murphy suggested an alternative solution to the literal incongruity between the Fifth Amendment text and a prohibition of adverse inferences. Justice Murphy wrote that a rule permitting adverse inferences "compels a defendant to be a witness against himself in one of two ways." *Adamson*, 332 U.S. at 124. First, if he remains silent and an adverse inference is invoked, "he is compelled, through his silence, to testify against himself" and "silence can be as effective in this situation as oral statements." *Id.* Second, if he testifies, "he is necessarily compelled to testify against himself" through exposure to cross-examination; "his testimony on cross-examination is the result of the coercive pressure of the provision rather than his own volition." *Id.*

This resolution of the textual problem, however, raises a subsequent question of degree. The Fifth Amendment does not, like the federal statute analyzed in *Wilson*, preclude “any presumption against” a silent defendant;<sup>77</sup> rather, it prohibits being “compelled” to be a witness.<sup>78</sup> This dictates the conclusion that “a necessary element” of a violation of the Amendment “is some kind of compulsion.”<sup>79</sup> The dissenters in *Griffin* seized on this constitutional prerequisite, arguing that “if any compulsion [could] be detected” in California’s rule permitting adverse comment, “it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee.”<sup>80</sup> Justice Scalia, joined by three other Justices, echoed this criticism thirty-five years later in *Mitchell v. United States*, bemoaning the expansion of *Griffin* to the sentencing context.<sup>81</sup> Commentators too have persuasively criticized *Griffin* for giving “inadequate weight to the language of the amendment that testimony must be ‘compelled.’”<sup>82</sup> As these critics

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Similarly in *Chapman v. California*, the Supreme Court, in considering the prejudicial impact of prosecutorial comment and judicial instruction deemed improper under *Griffin*, framed the harm that resulted as follows: “by their silence petitioners had served as irrefutable witnesses against themselves.” 386 U.S. 18, 25 (1967); *see also* Alschuler, *supra* note 2, at 2628 n.11 (arguing that “[t]he majority’s reliance on the doctrine of unconstitutional conditions in *Griffin* was unnecessary” and suggesting that the Court could alternatively have argued that adverse comment creates a situation where the defendant either testifies against herself by her silence or by her testimony); Craig M. Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH. L. REV. 1290, 1296 n.31 (1981) (“If the no comment rule is abolished the defendant can’t avoid ‘helping’ the prosecution, for either silence or testimony will be used against him.”). *But see* Ayer, *supra* note 6, at 868 (“The defendant’s decision to remain silent is not a testimonial or communicative act to which the fifth amendment applies.”).

<sup>77</sup> Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (current version at 18 U.S.C. § 3481 (2006)).

<sup>78</sup> U.S. CONST. amend. V.

<sup>79</sup> *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (“[S]ince at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion.”); *see also* McKune v. Lile, 536 U.S. 24, 35–36 (2002) (plurality opinion) (“The ‘Amendment speaks of compulsion,’ and the Court has insisted that the ‘constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony.’” (citation omitted)).

<sup>80</sup> *Griffin*, 380 U.S. at 620 (Stewart, J., dissenting).

<sup>81</sup> *Mitchell v. United States*, 526 U.S. 314, 331 (1999).

<sup>82</sup> Friendly, *supra* note 9, at 700; *see also* Ayer, *supra* note 6, at 864 (“The integrity of the *Griffin* rule can no longer be maintained on the theory that comment-generated

rightly insist, the compulsion requirement of the Fifth Amendment mandates some threshold that any complained of pressure to testify (or penalty for failing to testify) must pass for that pressure to constitute a constitutional violation.<sup>83</sup>

#### A. *The Fifth Amendment Does Not Bar All Penalties for Silence*

*Griffin* and *Carter* sidestep the critical question of degree by suggesting, as a doctrinal matter, that the question is irrelevant because (as stated in *Malloy*) a defendant must pay *no* penalty for the exercise of the right to remain silent. This suggestion, however, is belied by the actual emphasis in both *Carter* and *Griffin* of the purported severity of the penalty represented by adverse comment. More importantly, the implication that an exercise of the privilege against self-incrimination must be totally “cost free” has been roundly rejected in the Court’s other Fifth Amendment jurisprudence.<sup>84</sup>

As noted above, the “no penalty” rhetoric animating *Griffin* and *Carter* can be traced to *Malloy v. Hogan*, a case where, oddly enough, compulsion was not at issue. The petitioner in *Malloy* easily satisfied the compulsion hurdle as he was *jailed* for refusing to answer questions in a government inquiry.<sup>85</sup> The Supreme Court promptly employed the *Malloy* dicta in *Brooks v. Tennessee* where it invalidated one of the mildest penalties

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pressures to testify amount to compulsion.”); Lissa Griffin, *supra* note 12, at 956 (noting that the Fifth Amendment “prohibits compulsion” and “in the no-comment situation, the defendant is not being compelled to testify at all”); Sampsell-Jones, *supra* note 9, at 1347 (“The threat of an adverse inference, which is after all a relatively trivial penalty compared to torture or contempt, does not constitute compulsion.”); cf. Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1485 (1997) (arguing that *Griffin* is “wrong” in finding compulsion in adverse comment because the Fifth Amendment “privilege is violated if (and only if) judicial process compels the defendant to testify against himself or else go to jail for contempt” and “it does not follow that permitting the prosecutor to comment on a defendant’s choice not to testify, and permitting the trier of fact to draw reasonable inferences therefrom, is compulsory process requiring the defendant *to be a witness*”).

<sup>83</sup> See *infra* Part II.A.

<sup>84</sup> “It is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free.” *McKune*, 536 U.S. at 41 (plurality opinion).

<sup>85</sup> See *Miranda v. Arizona*, 384 U.S. 436, 512–13 (1966) (Harlan, J., dissenting) (criticizing majority for ignoring compulsion requirement, but accepting as a given that sanctions such as “jail or torture” would constitute compulsion under the Fifth Amendment); Paulsen, *supra* note 82, at 1485 (contending that *Griffin* is flawed because the Fifth Amendment “privilege is violated if (and only if) judicial process compels the defendant to testify against himself or else go to jail for contempt”).

fathomable on the right to remain silent—a state law that required the defendant to testify first of all the witnesses in the defense case.<sup>86</sup> The Court creatively struck down the Tennessee law because, by precluding defendant testimony later on in the defense case, the law “exact[s] a price” for the defendant’s *initial* silence (i.e., not testifying first) and thus “casts a heavy burden on a defendant’s otherwise unconditional right not to take the stand.”<sup>87</sup> Despite its fairly frequent appearances in the case law, *Malloy*’s “no penalty” language wildly overstates the Fifth Amendment’s protections, appearing more often in the harangues of dissenters than as a guiding principle for Fifth Amendment decisions. As the Court has consistently emphasized, “the Constitution does not forbid ‘every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.’”<sup>88</sup> There is always a question of degree.<sup>89</sup>

In fact, both before and after *Malloy*, the Supreme Court has upheld, against Fifth Amendment challenge, government-imposed “penalties” upon a defendant’s exercise of his right to silence. For example, in *McGautha v. California*, the Court rejected a Fifth Amendment challenge to a unitary death penalty trial, even though the nature of the trial forced the defendant to either testify in the guilt phase of the trial, or forego the opportunity to personally seek clemency in the penalty phase.<sup>90</sup> Indeed the procedure in *McGautha* is a direct analogue to that invalidated in *Brooks*. In

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<sup>86</sup> *Brooks v. Tennessee*, 406 U.S. 605, 610–11 (1972).

<sup>87</sup> *Id.* Twenty-eight years later, a very different Supreme Court majority would seize upon the holding of *Brooks* to support its ruling that if a defendant did, in fact, testify after the other witnesses (the option *Brooks* mandates), the prosecution could argue to the jury that the defendant’s testimony should be disregarded as predictably tailored to the testimony that came before. *Portuondo v. Agard*, 529 U.S. 61, 70 (2000).

<sup>88</sup> *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1978)).

<sup>89</sup> See *McKune*, 536 U.S. at 41 (plurality opinion) (“Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of [a] choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.”); *id.* at 49 (O’Connor, J., concurring) (“The text of the Fifth Amendment does not prohibit all penalties levied in response to a person’s refusal to incriminate himself or herself . . . . [S]ome penalties are so great as to ‘compel[]’ [a defendant’s] testimony, while others do not rise to that level.” (citations omitted)).

<sup>90</sup> *McGautha v. California*, 402 U.S. 183, 213 (1971) (summarizing the argument as follows: “the single-verdict procedure unlawfully compels the defendant to become a witness against himself on the issue of guilt by the threat of sentencing him to death without having heard from him”).



both cases, the defendant was required to make a tactical decision about whether to remain silent at an early point in the proceedings on pain of foregoing the right to speak at a later one.<sup>91</sup> In both cases, an initial choice to remain silent is penalized. Nevertheless, as a majority of the Court would later note in describing *McGautha*'s holding, even though "the free exercise of [the defendant's] Fifth Amendment right to remain silent was 'chilled' by the prospect that a harsher jury sentence might ensue," the *McGautha* "Court did not agree . . . that the burden imposed on that right was impermissible."<sup>92</sup>

In *Baxter v. Palmigiano*, the Court upheld against Fifth Amendment challenge the same penalty for silence that it prohibited in *Griffin*, albeit in a different context.<sup>93</sup> Emphasizing the unique challenges of prison administration, the Court in *Baxter* permitted correctional authorities adjudicating disciplinary infractions to draw an adverse inference from a prisoner's silence.<sup>94</sup> It was the dissent in that case, not the majority, emphasizing the language from *Malloy* that a person must "suffer no penalty" for invoking the right to remain silent.<sup>95</sup> As Justice Kennedy would later point out in extending *Baxter*, "[t]he inmate . . . no doubt felt compelled

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<sup>91</sup> *Id.* at 217 ("We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt."). The dissent in *Brooks* emphasized, without answer from the majority, that "the 'choice' we sustained in *McGautha* was far more difficult than that here, as the procedure there clearly exerted considerable force to compel the defendant to waive the privilege and take the stand in order to avoid the possible imposition of the death penalty." *Brooks*, 406 U.S. at 615 (Burger, J., dissenting).

<sup>92</sup> *Chaffin*, 412 U.S. at 31; *cf.* *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (concluding that use of silence to draw an adverse factual inference at sentencing constitutes "an impermissible burden on the exercise of the constitutional right against compelled self-incrimination" (*italics added*)); Poulin, *supra* note 10, at 205 (recognizing *Griffin* as an example of "the impermissible-burden approach" to the Fifth Amendment).

<sup>93</sup> 425 U.S. 308, 319 (1976).

<sup>94</sup> *Id.* at 317-18; *see also* *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (permitting adverse inference from defendant's silence in state clemency hearings).

<sup>95</sup> *Baxter*, 425 U.S. at 326 (Brennan, J., concurring and dissenting) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)); *see also* *Minnesota v. Murphy*, 465 U.S. 420, 436 n.7 (1984) ("[N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as 'one of a number of factors to be considered by a finder of fact' in deciding whether other conditions of probation have been violated." (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977))).

to speak in one sense of the word," but the *Baxter* Court "nevertheless rejected the inmate's self-incrimination claim."<sup>96</sup>

In *McKune v. Lile*, the Supreme Court rejected a Fifth Amendment challenge to a state program that rewarded inmates convicted of certain sex crimes if they agreed, inter alia, to complete a form detailing "all prior sexual activities" including uncharged criminal offenses.<sup>97</sup> The Court recognized that prisoners who refused to participate on the grounds of self-incrimination were, in effect, penalized for the exercise of their right to remain silent, but (after cataloguing the various analogous penalties for protected silence that it had upheld in other contexts) deemed the penalty insufficiently severe to constitute the compulsion forbidden by the Fifth Amendment.<sup>98</sup>

A case that arose decades before both *Malloy* and *Griffin*, *Raffel v. United States*,<sup>99</sup> provides yet another example. In *Raffel*, the Supreme Court permitted a testifying defendant to be impeached in a second trial by the fact that he had declined to testify in his first trial (the first trial resulted in a mistrial).<sup>100</sup> The Court explained, "having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."<sup>101</sup> The more recent case of *Jenkins v. Anderson* reaffirmed the principle established in *Raffel*, holding that a prosecutor could impeach the credibility of a testifying defendant with his

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<sup>96</sup> *McKune v. Lile*, 536 U.S. 24, 38 (plurality opinion); see Clymer, *supra* note 12, at 1378 (reading *Baxter* as concluding that "the threat to draw the inference . . . was not sufficient 'compulsion' to trigger the Fifth Amendment privilege" and suggesting that a similar approach could be applied in police officer disciplinary investigations).

*Baxter* also established that *Griffin's* prohibition of adverse inferences from trial silence does not apply in civil cases, allowing a civil defendant to be penalized for exercising the privilege. *Baxter*, 425 U.S. at 318 ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."); see also *Mitchell*, 526 U.S. at 328 (recognizing as "the prevailing rule" that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); *Ohio Adult Parole Auth.*, 523 U.S. at 286 (stating that a judicial body may draw an adverse inference from silence "in a civil proceeding without offending the Fifth Amendment").

<sup>97</sup> 536 U.S. at 30 (plurality opinion).

<sup>98</sup> *Id.* at 42.

<sup>99</sup> 271 U.S. 494 (1926).

<sup>100</sup> *Id.* at 496-97.

<sup>101</sup> *Id.* at 497.

silence prior to arrest.<sup>102</sup> The Court, again invoking a cloak metaphor, explained that the impeachment “follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial.”<sup>103</sup> In both *Raffel* and *Jenkins*, the defendant suffered a penalty at trial for exercising his constitutionally protected right to remain silent in a previous setting (in *Jenkins*, the Court assumed, without deciding, that prearrest silence could be construed as “an invocation of the [Fifth Amendment] right to remain silent”).<sup>104</sup> The Supreme Court, nevertheless, held that the penalty did not violate the Fifth Amendment.

Perhaps the most compelling rebuttal to the suggestion that the state may not pressure (ex ante) or penalize (ex post) defendants who decline to incriminate themselves can be found in the practice of plea bargaining. Under this widespread practice, the state bargains for a defendant’s admission of guilt by reducing the charges, agreeing to a sentencing cap or even promising leniency for a third party, such as a spouse.<sup>105</sup> Any

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<sup>102</sup> *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980); see Poulin, *supra* note 10, at 198 (recognizing “apparent conflict” between reasoning of *Griffin* and *Raffel*).

<sup>103</sup> *Jenkins*, 447 U.S. at 238.

<sup>104</sup> *Id.* at 236 n.2. The defendant in *Jenkins* claimed that he had killed in self-defense; the prosecutor argued that his claim was not credible because the defendant did not report the incident to police prior to his arrest. *Id.* at 234–35.

The Supreme Court has held that “because *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him,” the Due Process Clause forbids impeaching a defendant who remains silent after being given *Miranda* warnings with his pretrial, post-*Miranda* silence. *Anderson v. Charles*, 447 U.S. 404, 407–08 (1980); see also *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (setting forth the rule). But cf. *Portuondo v. Agard*, 529 U.S. 61, 74–75 (2000) (noting that “there might be reason to reconsider *Doyle*” but declining to do so and explaining the reasoning of that case on the ground that “[i]t is possible to believe that [the *Miranda* warnings given to the defendant in that case] contained an implicit promise that his choice of the option of silence would *not* be used against him”). Even if this authority were read to raise a due process obstacle to adverse comment on *trial* silence, it would not conflict with the argument posited in this Article because if the constitutional prohibition were tailored as described herein, the defendant would be informed (either through counsel or by the court) prior to declining to testify that his *trial* silence could be the subject of adverse comment and inference. See *Anderson*, 447 U.S. at 408; see also *infra* Part IV.C (“*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.”)

<sup>105</sup> See *United States v. Marquez*, 909 F.2d 738, 741 (2d Cir. 1990) (cataloguing cases where courts upheld plea agreements that involved a promise of lenity to a third party); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 732 n.85 (2006) (recognizing that pleas can involve promises of lenity for spouse or family members); cf. *Bordenkircher v. Hayes*,

significant offer by the state in this context places tremendous pressure on a defendant not only to abandon the privilege against self-incrimination, but to formally and conclusively admit guilt. (In the most extreme instance, a defendant may plead guilty to a serious criminal charge to avoid the death penalty.) Such an admission, by allowing the state to convict “without evidence from another source,” forms a compelling analogue to the historical practices the Fifth Amendment was designed to prevent.<sup>106</sup> The Court has nevertheless consistently held that the government may pressure a defendant to incriminate himself in this manner and, if the defendant declines to acquiesce, penalize him by pursuing the more serious charges and higher penalties that would have been abandoned had the defendant pled guilty.<sup>107</sup>

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434 U.S. 357, 365 (1978) (recognizing that such promises implicate the voluntariness of such pleas, but not explicitly ruling on their permissibility). It has been estimated that over ninety-five percent of criminal cases are resolved by plea bargains. See JENIA I. TURNER, *PLEA BARGAINING ACROSS BORDERS* 10 (Aspen 2009) (summarizing plea bargaining regime in the United States and noting that by 2004, “more than 95 percent of convictions in federal court and a similar number in state systems were resolved through no-contest or guilty pleas”); Ross, *supra*, at 717 (summarizing statistics released by the federal department of justice that “[i]n the criminal justice systems of the 50 states, over 95% of all criminal cases are disposed of without a trial, through the entry of a guilty plea” and “[i]n the federal system the percentage of bargained-for convictions is even higher”).

<sup>106</sup> See *Doe v. United States*, 487 U.S. 201, 212 (1988) (“Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.”); Langbein, *supra* note 9, at 12–19 (analogizing medieval law regarding torture to modern American practice of plea bargaining).

<sup>107</sup> See *McKune v. Lile*, 536 U.S. 24, 41–42 (2002) (plurality opinion) (“The Court likewise has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment.”); *Bordenkircher*, 434 U.S. at 364 (“While confronting a defendant with the risk of more severe punishment clearly may have a ‘discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’” (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973))); *Chaffin*, 412 U.S. at 30 (recognizing that “[i]n *Brady v. United States*, 397 U.S. 742 (1970), *Parker v. North Carolina*, 397 U.S. 790 (1970), and *North Carolina v. Alford*, 400 U.S. 25 (1970), defendants entered pleas of guilty in order to avoid the potential imposition of death sentences by a jury,” and despite the fact that each

Thus, the case law demonstrates that the oft-repeated *Malloy* dicta celebrating “the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will” and “to suffer no penalty . . . for such silence” cannot be taken literally.<sup>108</sup> Contrary to *Malloy*, and the implication in *Griffin* and *Carter*, the mere existence of some pressure on the right to remain silent, whether state-sponsored or not, does not violate the Fifth Amendment.<sup>109</sup>

*B. A Nuanced Approach to Adverse Comment: United States v. Robinson*

Given the case law summarized in the preceding section, it should come as no surprise that the Court’s flexible approach to penalties imposed on Fifth Amendment silence appears even in the Court’s few examinations of adverse comment since *Griffin* and *Carter*. In *United States v. Robinson*, defense counsel contended in closing argument that the government had not let the defendant explain certain incriminating circumstances.<sup>110</sup> The prosecutor rejoined in rebuttal argument that the defendant “could have taken the stand and explained it to you.”<sup>111</sup> The Supreme Court recognized that the prosecutor’s argument violated the pronouncement “in *Griffin* to the effect that the Fifth Amendment ‘forbids . . . comment by the prosecution on the accused’s silence.’”<sup>112</sup> In addition, the prosecutor’s comments constituted a penalty for silence, imposing “some ‘cost’ to the defendant in having remained silent.”<sup>113</sup> Nevertheless, the Court declined to interpret *Griffin* to

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defendant “was dissuaded from exercising his rights to a jury trial and to plead not guilty,” the “Court found no constitutional infirmity”).

<sup>108</sup> *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *cf. Miranda v. Arizona*, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting) (arguing that “the language in many of the opinions” in the self-incrimination context “overstates the actual course of decision” and citing *Malloy* as an example).

<sup>109</sup> See Poulin, *supra* note 10, at 205–06 (recognizing in examining *Griffin* and related cases that “[t]he Court has permitted the government to attach some negative consequences to the exercise of a constitutional right”); Snyder, *supra* note 9, at 288–89 (noting that the Supreme Court only prohibits certain “impermissible burden[s]” on the privilege, not all burdens).

<sup>110</sup> 485 U.S. 25, 26 (1988).

<sup>111</sup> *Id.* at 28.

<sup>112</sup> *Id.* at 33 (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965)).

<sup>113</sup> *Id.* at 34.

“preclude a fair response by the prosecutor in situations such as the present one.”<sup>114</sup>

*Robinson* relied on an earlier case, *Lockett v. Ohio*, which held that a state prosecutor’s repeated comments that the government’s evidence was “unrefuted” and “uncontradicted” did not violate the rule announced in *Griffin* even though the comments, arguably, invited an inference of guilt from the defendant’s trial silence. Rather than inflexibly applying the *Malloy* dicta, the Court in *Lockett* emphasized the various aspects of the case that minimized the penalty involved, principally that “the prosecutor’s closing remarks added nothing to the impression that had already been created by [the defendant’s] refusal to testify after the jury had been promised a defense by her lawyer and told that [the defendant] would take the stand.”<sup>115</sup>

Although downplayed in those opinions, the underlying principle applied in *Lockett* and *Robinson*—that adverse comment is not always an impermissible burden on defendant silence—is compelled by both the Court’s general Fifth Amendment jurisprudence and the Fifth Amendment’s text. Despite the Court’s protestations to the contrary, this principle cannot properly be viewed as an isolated exception to *Griffin*’s constitutional rule; rather, the principle faithfully reflects the Fifth Amendment text and must be applied more broadly.

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<sup>114</sup> *Id.*; see also *id.* at 32 (“[W]here as in this case the prosecutor’s reference to the defendant’s opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.”). Justice Marshall dissented, noting that “[a]s the Court itself recognizes, . . . the comments in this case imposed a penalty on respondent for his decision not to take the stand” and ran afoul of the Court’s pronouncements that “a criminal defendant is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.’” *Robinson*, 485 U.S. at 45 (quoting *Estelle v. Smith*, 451 U.S. 454, 467–68 (1981)). Justice Marshall asserted that the considerations relied on by the majority to conclude there was no constitutional violation merely informed the question of whether the violation was harmless and emphasized that “whether a prosecutorial comment imposes a cost on a defendant’s assertion of his Fifth Amendment privilege is not necessarily related to whether the comment is a response to the defense.” *Id.* at 41 n.3, 44 (Marshall, J., dissenting).

<sup>115</sup> *Lockett v. Ohio*, 438 U.S. 586, 595 (1978). Along these same lines, the Court has permitted adverse inference and instruction when a defendant testifies, but fails to fully rebut the prosecution’s evidence. *Caminetti v. United States*, 242 U.S. 470, 494 (1917) (“[W]here the accused takes the stand in his own behalf and voluntarily testifies for himself . . . he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.”).

*C. Adverse Comment Generally Creates Only Minimal Pressure to Testify*

Perhaps the most striking analytical flaw in *Griffin*'s uniform prohibition of adverse comment on defendant trial silence is the Court's failure to acknowledge that adverse comment is not always as severe a penalty as it was in *Griffin* itself. In fact, as other commentators have recognized, as a general matter, adverse comment constitutes a minimal burden on defendant silence.

Whether or not adverse prosecutorial or judicial comment is permitted, and irrespective of any judicial instruction to the contrary,<sup>116</sup> the defendant always suffers a "penalty" for declining to take the witness stand—the likelihood that jurors will notice the failure to testify and discount the probability of innocence accordingly. This inherent pressure to testify, however, does not constitute compulsion under the Fifth Amendment. As the Supreme Court has explained: "Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination."<sup>117</sup>

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<sup>116</sup> *United States v. Hasting*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring) ("[A] defendant's election not to testify 'is almost certain to prejudice the defense no matter what else happens in the court room.'" (quoting *United States v. Davis*, 437 F.2d 928, 933 (7th Cir. 1971))); *Raffel v. United States*, 271 U.S. 494, 499 (1926) ("We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence."); *Greenawalt*, *supra* note 9, at 57 ("[J]urors are likely to weigh a defendant's silence whatever they are told."); *Stone*, *supra* note 9, at 147 n.241 (noting that because "the jury will always be aware of defendant's silence at trial, even if no instruction is given, . . . the penalty in *Griffin* consists only of the additional impact of the prohibited instruction").

<sup>117</sup> *Barnes v. United States*, 412 U.S. 837, 847 (1973) (rejecting argument that common-law presumption of guilty knowledge from possession of recently stolen goods violates the privilege against self-incrimination); *see also* *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 287 (1998) (recognizing that in many circumstances, "there are undoubted pressures—generated by the strength of the government's case against him—pushing the criminal defendant to testify," but "it has never been suggested that such pressures constitute 'compulsion' for Fifth Amendment purposes"); *McGautha v. California*, 402 U.S. 183, 213 (1971) (plurality opinion) ("It is not contended, nor could it be successfully, that the mere force of evidence is compulsion of the sort forbidden by the privilege."); *Williams v. Florida*, 399 U.S. 78, 83–84 (1970) ("The defendant in a

Once the inherent pressure to testify created by the massing of prosecution evidence is subtracted from the calculus, it becomes difficult to argue that the artificial (i.e., court-sponsored) pressure generated by adverse comment and instruction increases the pressure to testify to a degree that amounts to compulsion to testify.<sup>118</sup> Indeed, *Carter* itself explicitly asserts that the penalty that arises without adverse comment "may be just as severe" as the penalty that arises when adverse comment is permitted.<sup>119</sup>

The Court's recognition of the primacy of the constitutionally benign pressure to testify that arises solely from the evidence explains the otherwise anomalous holding of *Barnes v. United States*.<sup>120</sup> In *Barnes*, the Supreme Court rejected a Fifth Amendment challenge to a jury instruction that "an inference of guilty knowledge may be drawn from the fact of *unexplained* possession of stolen goods."<sup>121</sup> The Court acknowledged that "the practical effect" of the instruction is to shift the burden of proving innocence to the

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criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction.").

*Griffin* itself implicitly recognized this point, taking pains to distinguish the penalty inherent in remaining silent from adverse prosecutorial or judicial comment, which is a "penalty imposed by courts." *Griffin v. California*, 380 U.S. 609, 614 (1965) (explaining that "[w]hat the jury may infer, given no help from the court" is a separate concern from "[w]hat it may infer when the court solemnizes the silence of the accused into evidence against him"); see also *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) (stating that "a defendant must pay no *court-imposed* price for the exercise of his constitutional privilege not to testify" (emphasis added)).

<sup>118</sup> Ayer, *supra* note 6, at 863 ("[T]he pressure to testify that the *Griffin* Court termed a 'penalty' is really an incidental product of 'the force of circumstances' and the weight of the evidence."); Greenawalt, *supra* note 9, at 53 n.130 (arguing that "the prospect of modest adverse comment by the judge is not likely to have great impact on the defendant's choice [as to whether or not to testify], particularly in light of the ability of his own counsel to provide an explanation why he has not testified"); Poulin, *supra* note 10, at 210 (noting that because "[t]he jury observes the defendant's failure to testify at trial even if neither the prosecutor nor the judge comments on that silence, . . . only a slight additional burden arises when the judge or prosecutor is permitted to comment"); Strauss, *supra* note 12, at 156 (acknowledging that the penalty identified in *Griffin* is minimal because "even without prosecutorial comment, a suspect knows that the jury is obviously aware of whether or not he or she takes the stand" and the "defendant thus already must include in his calculation whether remaining silent impacts the jury"); cf. *Boyde v. California*, 494 U.S. 370, 385 (1990) ("[T]he arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.").

<sup>119</sup> *Carter*, 450 U.S. at 301.

<sup>120</sup> 412 U.S. 837 (1973).

<sup>121</sup> See *id.* at 843 (emphasis added).



defendant.<sup>122</sup> When the defendant is the only person who can rebut the stated inference by explaining his possession of stolen goods (as will often be the case), the conclusion is also unavoidable that the instruction, like that in *Griffin*, pressures the defendant to testify by rendering a decision not to do so more “costly.”<sup>123</sup> Nevertheless, the Supreme Court in *Barnes*, affirming the validity of a long line of cases upholding similar instructions, held that this pressure arises primarily from the evidence, and so does not violate the privilege against self-incrimination.<sup>124</sup>

The critical point implicit in *Barnes* (and ignored in *Griffin*) is that adverse comment or instruction has little inherent force. It relies for its effect on the state of the evidence in any particular case. In some cases, the evidence demands a response. If the evidence establishes the defendant’s presence at the crime scene (*Griffin*) or possession of stolen items (*Barnes*), a defendant is virtually compelled to provide some explanation regardless of whether the prosecutor (or court) highlights its absence. Defendant silence in the face of such evidence is, as they say, deafening. On the other hand, when the defense forcefully rebuts the prosecution case without reliance on the defendant’s testimony (either by exposing flaws in the government case through cross-examination or by presenting affirmative evidence), there is little pressure to take the stand.<sup>125</sup> For example, if the defense is able to put on a compelling alibi witness or to wholly discredit the prosecution’s eyewitness, the prosecutor’s harping on the absence of the defendant’s own testimony will come across as an act of desperation.<sup>126</sup>

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<sup>122</sup> *Id.* at 846 n.11.

<sup>123</sup> *Griffin v. California*, 380 U.S. 609, 614 (1965).

<sup>124</sup> *Barnes*, 412 U.S. at 846 (citing *Turner v. United States*, 396 U.S. 398, 417–18 (1970); *Yee Hem v. United States*, 268 U.S. 178, 185 (1925)); *see also* *United States v. Gainey*, 380 U.S. 63, 70–71 (1965) (holding that instruction that the jury could infer defendant’s complicity in illegal distillery operation from his unexplained presence at the still would not be “fairly understood as a comment on the petitioner’s failure to testify” because “[t]he judge’s overall reference was carefully directed to the evidence as a whole”).

<sup>125</sup> *Cf. Parker v. State*, 39 A. 651, 654 (N.J. Sup. Ct. 1898) (“There may be cases in which the evidence against the accused does not directly affect him, and a reply from him could not necessarily be expected. His failure to offer himself as a witness when his testimony could not meet or disprove any particular fact or circumstance, and could only consist of a general denial of guilt, probably ought not to affect him, and, if so, his silence should not be commented on or considered.”).

<sup>126</sup> This is particularly true if the rule permitting adverse comment mandates an instruction, as did California’s pre-*Griffin* rule, that the failure of a defendant to testify

In sum, given the inherent power of the government's evidence to compel testimony (and the relative inability of argument and instruction to achieve that same result), the conclusion is unavoidable that the greater part of the pressure to testify contemplated in *Griffin* arises from the evidence in a particular case, not adverse comment or instruction on a defendant's refusal to testify. *Carter* itself concedes as much. It is only when the prosecution evidence remains unshaken by the other tools available to the defense and demonstrates the defendant's knowledge of key facts in dispute, that the defendant's failure to testify becomes an irresistible subject for (adverse) juror speculation. Even when this occurs, however, adverse comment and instruction, or the lack thereof, play only a marginal role in the defendant's decision to testify. While certainly one factor in the tactical calculus, the pressure of adverse comment in these circumstances cannot, absent some additional consideration, be equated with the compulsion necessary to trigger a Fifth Amendment violation.

### III. RECONCEPTUALIZING THE FIFTH AMENDMENT PROHIBITION OF ADVERSE COMMENT

While the Supreme Court has never explicitly repudiated *Malloy's* no-penalty dicta, the Justices have acknowledged the subtle and subjective balancing act that lies at the core of their Fifth Amendment penalty jurisprudence. Concurring in *McKune*, Justice O'Connor candidly summarized the jurisprudence as follows: "The text of the Fifth Amendment does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself . . . . [S]ome penalties are so great as to 'compe[l]' [a defendant's] testimony, while others do not rise to that level."<sup>127</sup> Justice Kennedy echoed these sentiments, writing for four other justices in the same case: "Determining what constitutes unconstitutional

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cannot make up for a failure of proof in the prosecution case. See *Griffin*, 380 U.S. at 622 (Stewart, J., dissenting); *People v. Adamson*, 165 P.2d 3, 9–10 (Cal. 1946).

<sup>127</sup> *McKune v. Lile*, 536 U.S. 24, 49 (2002) (O'Connor, J., concurring in judgment); see *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) ("[O]ur cases have established that a State may not impose *substantial penalties* because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." (emphasis added)); cf. *Minnesota v. Murphy*, 465 U.S. 420, 437 (1984) (emphasizing in rejecting Fifth Amendment challenge that "there is no reasonable basis for concluding that Minnesota attempted to attach an *impermissible* penalty to the exercise of the privilege against self-incrimination" (emphasis added)); *United States v. Antelope*, 395 F.3d 1128, 1135 (9th Cir. 2005) ("[A]n individual choosing silence does not get a free pass against all possible repercussions.").

compulsion involves a question of judgment: Courts must decide whether the consequences of [a] choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.”<sup>128</sup> These acknowledgements of the inherent subjectivity of Fifth Amendment penalty jurisprudence, while refreshing in their candor, merely frame the inquiry. The far more difficult task is identifying precisely what differentiates the penalties upon protected silence that are sufficiently severe to be forbidden by the Fifth Amendment.<sup>129</sup>

As discussed in Part I, *supra*, the Supreme Court sidestepped this difficulty in *Griffin* and *Carter* by implying that any pressure, however mild, violates the Fifth Amendment. As we have seen, both the Fifth Amendment text and the Court’s own case law refute this proposition. Further, as explained in Part II.C, *supra*, as a general matter, adverse comment constitutes only a mild penalty for trial silence.

The analysis in the preceding sections does not, however, compel the conclusion that the Fifth Amendment prohibition of adverse comment must be scrapped entirely. As this section will explain, an alternative rationale for the prohibition exists. In fact, a robust justification for a narrow constitutional prohibition of adverse comment can be drawn out of both the constitutional text and the existing Supreme Court case law.

As already alluded to, *Griffin* and *Carter* are amenable to a more nuanced interpretation than has thus far been adopted by the courts and commentators. While *Griffin* was decided less than a year after *Malloy*, the opinion does not rely solely on *Malloy*’s no-penalty rhetoric. Instead, the *Griffin* Court took pains to emphasize that adverse comment was not merely punitive, but *unfairly* so because the inference of guilt from silence is “not always . . . natural or irresistible.”<sup>130</sup> The reliance on a fairness paradigm

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<sup>128</sup> *McKune*, 536 U.S. at 41 (plurality opinion).

<sup>129</sup> Justice O’Connor, in *McKune*, criticized her colleagues’ “failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination.” *Id.* at 53–54 (O’Connor, J., concurring in judgment); *see also* *Carter v. Kentucky*, 450 U.S. 288, 310 (1981) (Rehnquist, J., dissenting) (criticizing “[t]he concept of ‘burdens’ and ‘penalties’” as “a vague one”); Ayer, *supra* note 6, at 854 (“[N]o simple rule exists to sort permissible from impermissible burdens on constitutional rights.”); Strauss, *supra* note 12, at 155 (“Of course, not all burdens on the exercise of a right constitute an unconstitutional penalty. The question then becomes: When is a burden impermissible? There does not appear to be a clear answer to this question.”).

<sup>130</sup> *Griffin*, 380 U.S. at 615. As the discussion in the text indicates, a perceived narrowing of *Griffin* cannot be rested solely at the feet of personnel changes in the Supreme Court. *See* Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 *FORDHAM L. REV.* 2313, 2375–76 (2001) (arguing that “the current [Rehnquist] Court

reappears in *Carter* where the Court stated that permitting the jury to draw an inference of guilt from silence is often misleading because “there are many reasons unrelated to guilt or innocence for declining to testify.”<sup>131</sup> A related (although not identical) fairness rationale is again implicit in the cloak metaphors employed in *Raffel* and *Jenkins*, where the defendant’s figurative abandonment of his “cloak of silence” opened the door to the prosecutor’s use of otherwise protected silence as impeachment.<sup>132</sup> As discussed above, *Robinson* and *Lockett* explicitly rely on a fairness paradigm in permitting otherwise forbidden adverse comment.<sup>133</sup>

Although the Supreme Court has never taken this step, the unfairness intuition repeatedly invoked in its case law can be placed within a doctrinal framework to answer the otherwise devastating criticism (discussed in Part II, *supra*) that adverse comment does not amount to compulsion. This approach would emphasize that it is the unfairness of adverse comment, in certain cases, that aggravates the comment’s severity as a penalty, causing it to become an analogue to the forbidden compulsion to testify. Adopting Justice O’Connor and Justice Kennedy’s respective characterizations of the question, the unfairness of adverse comment is precisely what makes it a penalty “so great as to ‘compe[l]’”<sup>134</sup> defendant testimony, and what places

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views *Griffin* as a due process ‘fundamental fairness’ case, rather than a penumbral Fifth Amendment case” and that this “shift in rationale, if it is confirmed in future cases, would further limit the scope of *Griffin*, since it would mean that only ‘fundamentally unfair’ burdens on constitutional rights would be prohibited”). The groundwork for narrowing *Griffin*’s prohibition to cases involving unfairness can be found in *Griffin* itself, as well as earlier cases.

<sup>131</sup> *Carter*, 450 U.S. at 300 n.15; see also *Portuondo v. Agard*, 529 U.S. 61, 67 (2000) (emphasizing that “[a] defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear that his prior convictions will prejudice the jury”); *Brooks v. Tennessee*, 406 U.S. 605, 611–12 (1972) (noting that there are “very real and legitimate concerns that might motivate a defendant to exercise his right of silence” and that compelling a defendant to testify first or not at all “may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear”).

<sup>132</sup> *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (allowing impeachment with protected silence because it “follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial”); *Raffel v. United States*, 271 U.S. 494, 497 (1926) (“[H]aving once cast aside the cloak of immunity, [the defendant] may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.”).

<sup>133</sup> See *supra* Part II.B.

<sup>134</sup> *McKune v. Lile*, 536 U.S. 24, 49 (2002) (O’Connor, J., concurring in judgment).

the penalty incurred by silence “closer to the physical torture against which the Constitution clearly protects” than to “the *de minimis* harms against which it does not.”<sup>135</sup>

The dilemma of the defendant with prior convictions best illustrates this effect. Many defendants, like the defendants in both *Griffin* and *Carter*, are clearly motivated to remain silent at trial to avoid impeachment with criminal convictions. The defendant in *Griffin*, on trial for a murder committed during an attempted rape, would have been impeached (had he testified) with a prior rape conviction and a felony conviction for being a “sexually dangerous person.”<sup>136</sup> The defendant in *Carter*, on trial for burglarizing a store, avoided impeachment with prior convictions for store burglary and receipt of stolen property.<sup>137</sup> Clearly an adverse inference from silence in these circumstances—i.e., the suggestion that the defendant’s silence reflects guilt—is unwarranted and unfair. The defendant’s silence is, in no way, indicative of guilt.<sup>138</sup> It reflects only the fear that the jury will leap to a

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<sup>135</sup> *Id.* at 41 (plurality opinion); see also *Portuondo*, 529 U.S. at 77 (Ginsburg, with Souter, JJ., dissenting) (suggesting that the rule in *Griffin* “stem[s] from the principle that where the exercise of constitutional rights is ‘insolubly ambiguous’ as between innocence and guilt . . . a prosecutor may not *unfairly* encumber those rights by urging the jury to construe the ambiguity against the defendant” (emphasis added)).

<sup>136</sup> See Brief of Petitioner-Appellant at 3, *Griffin v. California*, 380 U.S. 609 (1965) (No. 202), 1964 WL 81335; see also *People v. Griffin*, 383 P.2d 432, 437 (Cal. 1963) (“Implicit in the verdict of the jury was a finding that the killing was committed during an attempted rape.”).

<sup>137</sup> See Brief of Petitioner-Appellant at 2–3, *Carter v. Kentucky*, 450 U.S. 288 (1981) (No. 80-5060), 1980 WL 339742. *Carter*’s prior convictions for “Storehouse Breaking” and “Knowingly Receiving Stolen Property Over \$100.00” were less serious than *Griffin*’s prior convictions, but equally prejudicial in the context of the case, considering that *Carter* was charged with burglarizing a store. See *id.*

<sup>138</sup> One might contend that the existence of the criminal record demonstrates the defendant’s general criminal propensities and thus does support an inference of guilt after all. For purposes of American criminal trials, however, this line of reasoning has long been rejected. See *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (explaining that evidence of the defendant’s “prior trouble with the law” is excluded not “because [it] is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge”); FED. R. EVID. 404 (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”). Thus, when a trial court admits evidence of a testifying defendant’s prior convictions as impeachment, it must then instruct the jury that the evidence *cannot* be considered as substantive evidence of guilt. See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289,

legally prohibited conclusion of guilt when it learns of the defendant's criminal record. Indeed, the urging of an adverse inference from silence in these circumstances appears to violate a basic postulate of the justice system—the prosecutor and court would be suggesting that the jury convict based on an inference known to be false.<sup>139</sup>

Significantly, the unfairness of urging an adverse inference from silence when the defendant has prior convictions cannot be dispelled by evidence and argument. A defendant who declines to testify to hide his criminal record cannot, as a practical matter, explain his reason for failing to testify to the jury. Were the defendant to inform the jury of his prior convictions, it would defeat the very purpose of his refusal to testify. In essence, the defendant would be forced to incriminate himself to avoid self-incrimination.<sup>140</sup>

For the defendant with prior convictions, then, adverse comment is not simply the marginal reinforcement of a natural inference of guilt from silence discussed in Part II.C, *supra*. The defendant is threatened with a court-sponsored and un rebuttable inference that (with the court and prosecutor's full awareness) misleads the jury as to the actual reason for his silence. As a result of this unfairness, the penalty imposed by adverse comment is significantly more severe than exists in circumstances where either: (i) an adverse inference is fully consistent with the actual motivation for the defendant's silence (and thus merely parallels and marginally reinforces an otherwise natural and irresistible inference); or (ii) when the inference is

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300 (2008) (discussing American courts' reliance on limiting instructions to resolve the tension between the prohibition of prior crimes as propensity evidence and their admission as impeachment).

<sup>139</sup> See *Giglio v. United States*, 405 U.S. 150, 153 (1972) (emphasizing that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and the "same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears"); *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) ("[I]t is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt."); see also *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) ("In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."). In *Griffin*, the attorney for the petitioner argued that it "was misconduct by the prosecutor" to argue for an adverse inference "as he knew that the defendant had suffered prior convictions of a felony and that he would be seriously impeached and badly reflected upon before the jury." Brief of Petitioner-Appellant at 10, *Griffin v. California*, 380 U.S. 609 (1965) (No. 202), 1964 WL 81335.

<sup>140</sup> Schulhofer, *supra* note 6, at 334 ("Realistically, we cannot give the jury the full picture without creating the very prejudice to innocent defendants from which the privilege should shield them in the first place.").

inconsistent with the defendant's true motivation for silence, but that inconsistency can be brought before the jury. For the defendant with prior convictions, the penalty for silence can even be said to be so severe that it amounts to something on the order of compulsion.<sup>141</sup>

Thus, by emphasizing the fairness concerns that adverse comment imports into the Fifth Amendment penalty analysis (and are already highlighted in the governing case law), the courts can shore up the precarious constitutional footing of *Griffin* and its progeny. Adverse comment becomes an unconstitutional penalty upon a defendant's silence when, as in *Griffin* itself,<sup>142</sup> the prosecutor or judge suggests the jury draw an unfair (i.e., counterfactual and un rebuttable) inference from protected silence. In all other circumstances, however, *Griffin*'s blanket prohibition of adverse comment is unwarranted.<sup>143</sup>

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<sup>141</sup> In a comment on Ayers, Professor Bradley briefly sketches an argument that is roughly analogous to the unfair penalty thesis posited here. See Bradley, *supra* note 76, at 1296 ("[G]iven that there are a variety of reasons, totally consistent with innocence, that may impel one to exercise his fifth amendment right to silence, it flows that to allow the judge or prosecutor to tell the jury that such an exercise is evidence of guilt is not 'rational' and should not be permitted. The drawing of an 'irrational' inference from the exercise of a constitutional right is clearly an impermissible burden."). In contrast to this article's thesis, however, Bradley suggests that this analysis provides a complete defense for the *Griffin* rule. See *id.* at 1298 ("[T]he [*Griffin*] rule is firmly rooted in a basic truism: There are many reasons apart from guilt—particularly fear of impeachment with prior convictions—that may cause a defendant, upon advice of counsel, to choose not to testify. To allow the prosecutor to argue that failure to testify is evidence of guilt is thus irrational and inconsistent with our traditional understanding of the fifth amendment privilege. Such argument is therefore an impermissible burden on the right of silence."); cf. *Portuondo v. Agard*, 529 U.S. 61, 77 (2000) (Ginsburg, with Souter, JJ., dissenting) (suggesting that *Griffin* "stem[s] from the principle that where the exercise of constitutional rights is 'insolubly ambiguous' as between innocence and guilt . . . a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant").

<sup>142</sup> See Brief of Petitioner-Appellant at 3, *Griffin v. California*, 380 U.S. 609 (1965) (No. 202), 1964 WL 81335 (noting that the defendant in *Griffin* had previously been convicted of rape and being a "sexually dangerous person, a felony").

<sup>143</sup> In arguing for complete abolition of the *Griffin* rule, Sampsell-Jones nevertheless contends that "if a defendant declines to take the stand in order to avoid the prosecution's use of other crimes for impeachment, the prosecution should not be able to argue that the defendant's silence constitutes an admission" because "the defendant would not have an opportunity to explain his silence without revealing unfairly prejudicial information." Sampsell-Jones, *supra* note 9, at 1356. Sampsell-Jones suggests that these protections could be implemented by statute as well as through "general principles of evidence law." See *id.* There is no guarantee, however, that the delicate transition from constitutional to

#### IV. IMPLICATIONS OF A NARROWED PROHIBITION OF ADVERSE COMMENT

A recognition of the distinctive Fifth Amendment concerns raised by *unfairly* penalizing trial silence fortifies the prohibition of adverse comment against the doctrinal critiques noted at the outset of this article. At the same time, this recognition highlights the fact that the current prohibition, which protects all defendants who remain silent at trial regardless of the motivations for their silence, far outstrips any coherent Fifth Amendment rationale. Stated more precisely, if, as this article contends, a Fifth Amendment rationale for prohibiting adverse comment hinges on (i) eliminating unfair comment, that (ii) penalizes a Fifth Amendment refusal to incriminate oneself, the existing prohibition is erroneously protecting many defendants who either suffer no unfairness from adverse comment or who are silent for reasons unprotected by the Fifth Amendment.

Focusing initially on unfairness, it is axiomatic that an inference of guilt from silence "is not always . . . natural or irresistible"<sup>144</sup> and thus adverse comment is often unfair. It is equally clear, however, that such comment is not always unfair. Discouraging adverse comment in cases where an inference of guilt from silence is natural and irresistible makes little sense as an intuitive matter<sup>145</sup> and, more significantly, cannot be supported by the unfairness rationale posited here as the sole doctrinally defensible justification for a Fifth Amendment prohibition of adverse comment.

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statutory protections that Sampsell-Jones envisions would take place. If *Griffin's* constitutional rule is abolished (rather than more narrowly tailored as suggested here), the States would once again be permitted, as in pre-*Griffin* California, to allow adverse comment on a defendant's silence even if the defendant remained silent to avoid impeachment with prior convictions. While some states might choose to implement the statutory protections Sampsell-Jones supports, others undoubtedly would not. *Cf.* Bellin, *supra* note 9, at 888 (advocating that *Griffin* be "limited to the circumstances" present in *Griffin* and *Carter* "where numerous tactical considerations unknown to juries (primarily, impeachment with prior convictions) invalidated any otherwise natural inference that a defendant's refusal to testify indicated consciousness of guilt").

<sup>144</sup> *Griffin v. California*, 380 U.S. 609, 615 (1965).

<sup>145</sup> *Adamson v. California*, 332 U.S. 46, 60-61 (1947) (Frankfurter, J., concurring) (noting that "[s]ensible and justminded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict" and criticizing the idea that the constitution does not "allow jurors to do that which sensible and rightminded men do every day").



Moving next to the Fifth Amendment grounding of the prohibition, it also appears that the courts are invoking a Fifth Amendment prohibition against adverse comment to protect some refusals to testify that do not sound in the Fifth Amendment. In fact, courts generally fail to engage in any rigorous Fifth Amendment analysis when the subject of that analysis is the defendant in a criminal trial.

The next section further analyzes the deficiencies of the existing blanket prohibition of adverse comment by exploring the various motives for defendants to remain silent at trial. As this exploration reveals, while defendants' motives vary widely and may even overlap, only a discrete subset of motivations for remaining silent at trial trigger protection from adverse inferences under a Fifth Amendment (unfair) penalty rationale.

#### *A. Defendants for Whom an Unfair Penalty Rationale Justifies a Prohibition of Adverse Comment*

A significant portion of criminal defendants, typified by the defendants in *Griffin* and *Carter*, fall comfortably within the unfair penalty rationale for a prohibition of adverse comment posited in Part III, *supra*. As discussed below, this group consists of two types of defendants: (1) those who will be impeached with prior convictions should they testify; and (2) those who fear implicating themselves in an uncharged crime.

##### *1. Defendants Who Do Not Testify to Avoid Revealing Their Prior Convictions*

Procedurally, a defendant with a criminal record who desires to testify will seek a pretrial ruling precluding the introduction of his criminal record as impeachment.<sup>146</sup> The prosecution generally opposes the request.<sup>147</sup> If the

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<sup>146</sup> See FED. R. EVID. 609 (setting forth balancing test that permits exclusion of prior convictions in federal criminal trials); *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (recognizing, in context of defense efforts to exclude prior convictions, that “[a]lthough the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court’s inherent authority to manage the course of trials”). Prosecutors too may strike first, by seeking a preliminary ruling that a defendant’s prior convictions are admissible should the defendant testify.

<sup>147</sup> See 1 MCCORMICK ON EVIDENCE § 42, at 198 (Kenneth S. Broun et al. eds., 6th ed. 2006) (noting that “[m]ost prosecutors argue” that impeachment should be permitted because “it is misleading to permit the accused to appear as a witness of blameless life”); Friedman, *supra* note 19, at 639 (recognizing that “prosecutors offer [prior conviction impeachment] evidence very frequently, and both sides recognize its potency and often

pretrial request is denied, the defendant often declines to testify.<sup>148</sup> It will be obvious in such cases that the primary motivation for the defendant's silence

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litigate its admissibility with great vigor"); Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 190 (1940) (asserting that potential to introduce defendant's criminal record as impeachment "is something never missed by the prosecuting attorney").

<sup>148</sup> See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009) (finding a statistically significant association "between the existence of a criminal record and the decision to testify at trial"); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 482 (1992) (citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not"); cf. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 489–90 (2008) (analyzing data regarding defendants cleared by post-conviction DNA testing and determining that 39% of apparently innocent defendants did not testify and 91% of those who did not testify had prior convictions).

Eisenberg and Hans report that only 52% of defendants with a "criminal record" who testified in the jurisdictions studied were impeached with that record and conclude that this "suggest[s] that judges, as evidentiary rules require, balance the relevance of a prior criminal record with the possible prejudice to the defendant." Eisenberg & Hans, *supra*, at 1373. This conclusion may be incorrect, however, as it is almost completely inapplicable for two of the four jurisdictions studied. See CAL. CONST. art. I, § 28, subdiv. (f) ("Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment . . ."); D.C. CODE § 14-305 (b)(1) (LexisNexis 2008) (mandating admission of any felony conviction offered as impeachment without any balancing); see also *People v. Hinton* 126 P.3d 981, 1018 (Cal. 2006) (recognizing narrow discretion despite constitutional provision for trial courts to exclude impeachment due to "substantial danger of undue prejudice" as per generic evidentiary rules); cf. Bellin, *supra* note 138, at 324–35 (documenting state and federal courts' doctrinal shift toward permitting impeachment with virtually any felony conviction); Blume, *supra*, at 490 (reporting in a recent study that "[i]n every single case in which a defendant with a prior record testified, the trial court permitted the prosecution to impeach the defendant with his or her prior convictions"). It is possible that the high percentage of defendants who testified free of impeachment in the Eisenberg and Hans study is an artifact of a data set that did not specifically define "criminal record." See Eisenberg & Hans, *supra*, at 1389 (acknowledging that "we had information only about the presence of a defendant's criminal record, not its type"). All or most of the instances where a testifying defendant was not impeached may be explained by the fact that the defendant's "criminal record" consisted entirely of non-impeachable offenses, such as misdemeanor offenses. Blume, *supra*, at 490 n.50 (critiquing same finding on the ground that the data used in the Eisenberg and Hans study "did not permit a determination of whether the prior conviction could have been used for impeachment purposes").

is the existence of the prior convictions. This explanation, however, cannot be made known to the jury without incriminating the defendant and thus short circuiting the defendant's effort to avoid self-incrimination.

In the circumstances just described, the unfair-penalty rationale applies with full force. An adverse inference of guilt from silence is an unfair and particularly severe penalty for the defendant's trial silence because, unbeknownst to the jury, the inference endorsed by the prosecutor and condoned by the court is belied by the actual reason for the defendant's refusal to testify. Further, it is a penalty that sounds in the Fifth Amendment. The defendant declines to testify because he fears that testimony acknowledging his criminal record will incriminate him in the eyes of the jury. In short, the defendant remains silent and in so doing suffers a penalty roughly analogous to compulsion in order to avoid testifying against himself.<sup>149</sup>

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<sup>149</sup> An innocent defendant who declines to testify to avoid revealing his prior record is by no means acting irrationally. See Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again*, 74 N.C. L. REV. 1559, 1632 (1996) ("The principal reason why defendants refuse to take the stand is that they fear impeachment with prior convictions—a fear with strong support from the empirical evidence."); Eisenberg & Hans, *supra* note 148, at 1357 (concluding after empirical analysis that juries appear to rely on a defendant's criminal record, introduced as impeachment, to convict in cases where the evidence is otherwise weak and that "[t]he effect in otherwise weak cases is substantial and can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%"). This is one of the key problems with Seidmann and Stein's dismissal of prior conviction impeachment as a potential justification for the *Griffin* rule. See Seidmann & Stein, *supra* note 12. Seidmann and Stein appear to assume away the problem, arguing:

In a rational world, in which jurors properly determine the reasonable level of doubt, innocents with prior criminal records do not require *Griffin* protection. Imagine that a significant proportion of innocents do not testify because they fear impeachment by prior convictions. If the jury is aware of their motives for not testifying, then it would also not draw adverse inferences in the absence of *Griffin*.

*Id.* at 494–95. But see sources cited *infra* note 153 (noting widespread criticism of suggestion that juries can disregard evidence of prior convictions in assessing factual guilt and citing juror studies supporting the criticisms); Bellin, *supra* note 138, at 300–01 & nn.39–40 (explaining that "empirical studies and common sense suggest that a limiting instruction offers little protection against the prejudice inherent in prior conviction impeachment" and that "[t]his sentiment is reflected in the sheer number of defendants who simply refrain from testifying rather than rely on the instruction").

One might object that because the jury will be instructed not to consider a defendant's prior crimes as substantive evidence (only as impeachment), a fear of revealing prior crimes is not a valid basis for invoking the privilege.<sup>150</sup> Under the case law, the Fifth Amendment's bar to compulsory self-incrimination protects a person only from furnishing evidence that provides a "link in the chain of evidence" necessary to convict him of a crime—i.e., substantive evidence of guilt.<sup>151</sup> The admission of a defendant's prior criminal record, however, occupies something of a hybrid place in the evidentiary realm, residing somewhere between impeachment and substantive evidence.<sup>152</sup> Its admission is widely recognized as extremely damaging not just as impeachment but also as substantive propensity evidence.<sup>153</sup> Consequently, a desire to preclude admission of a criminal

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<sup>150</sup> A typical instruction reads: "Th[e] [defendant's] earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now." KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, 1A FEDERAL JURY PRACTICE & INSTRUCTIONS § 15.08, at 427 (6th ed. 2007) (listing this instruction from the Sixth Circuit and providing other examples by circuit).

<sup>151</sup> *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951).

<sup>152</sup> See *Loper v. Beto*, 405 U.S. 473, 482–83 n.11 (1972) (recognizing "[t]hat a record of prior convictions may actually do more than simply impeach a defendant's credibility": "If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are for crimes similar to the one on trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility." (quoting MCCORMICK ON EVIDENCE § 43, at 93 (1st ed. 1954))); Bellin, *supra* note 138, at 300–03 (discussing inherent overlap in permissible inference of lack of credibility from prior conviction and prohibited inference of substantive guilt from prior conviction).

<sup>153</sup> See James Beaver & Steven Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 602, 607 (1985) (arguing that despite limiting instruction, "[f]ew academicians believe . . . that jurors consider past crimes solely for impeachment purposes and not as proof of the defendant's likelihood of having committed the charged offense" and reporting empirical data that suggest that juries do not, in fact, follow instruction); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 31, 32 (1999) (reporting results of juror studies revealing that "jurors do use prior conviction evidence to infer criminal propensity and frequently ignore or fail to understand limiting instructions"); Eisenberg & Hans, *supra* note 148, at 1358–61 (surveying mock juror studies and concluding that "[m]ost of the experimental studies show that knowledge of a defendant's criminal record has statistically significant biasing effects on jurors' guilt perceptions and verdicts" and that "experimental research

record should satisfy the requirement that “the witness has reasonable cause to apprehend danger from a direct answer.”<sup>154</sup> As the Supreme Court has stated: “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”<sup>155</sup>

## 2. Defendants Who Fear Revealing Complicity in Uncharged Crimes

A second scenario that satisfies the prerequisites for a Fifth Amendment-based prohibition of adverse comment arises when defendants decline to testify to avoid incriminating themselves in an offense other than the offense charged. For example, a defendant may have sold drugs to a victim who was later assaulted. If the defendant were to testify, he might convince the jury to acquit him on the assault charge, but at the same time incriminate himself in the drug sale.<sup>156</sup>

A defendant who remains silent in this circumstance is faced with an adverse inference (that he is refusing to testify because he cannot rebut the prosecution’s evidence of the charged crime) that is unusually severe because it is contrary to fact. The inference is also unfair in that it is effectively un rebuttable so long as the defendant maintains his Fifth Amendment right against self incrimination. The defendant cannot rebut the adverse inference without incriminating himself (by revealing the uncharged criminal conduct).

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also suggests that limiting instructions are not a reliable method for eliminating the negative impact of criminal records”); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 403 (1980) (“Practicing attorneys almost universally concede that the limiting instruction fails to achieve its goal.”); see also *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” (citations omitted)).

<sup>154</sup> *Hoffman*, 341 U.S. at 487.

<sup>155</sup> *Id.* at 486–87. A defendant might also decline to testify to avoid a sentence enhancement for perceived perjury. See Bellin, *supra* note 9, at 877–80. A clear analogue to this circumstance has been held not to violate the privilege. See *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (holding that witness cannot claim privilege based on fear that testimony will later be used in prosecution for perjury).

<sup>156</sup> The fact that the defendant was not currently charged with the drug sale is irrelevant. The privilege applies in any proceeding, whether civil or criminal, “where the answers might incriminate [the speaker] in future criminal proceedings.” See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

For this defendant, adverse comment can be characterized as a penalty akin to compulsion that sounds in the Fifth Amendment privilege and therefore must be prohibited.<sup>157</sup>

*B. Defendants for Whom an Unfair Penalty Rationale Cannot Justify a Prohibition of Adverse Comment*

The defendants discussed in the previous section fall comfortably within an unfair-penalty rationale and should, therefore, be shielded from adverse comment by the Fifth Amendment. The contrary is true for all other silent defendants. For the balance of silent defendants, either the absence of unfairness renders the penalty imposed by adverse comment insufficiently severe to constitute compulsion, or the defendant's motive for remaining silent does not sound in the Fifth Amendment. In these circumstances, there is no Fifth Amendment basis for prohibiting an adverse inference and, absent a statutory prohibition, the prosecution must be permitted to comment on the defendant's silence.<sup>158</sup>

*1. Defendants Who Do Not Testify Because Their Testimony Will Support the Prosecution Case*

Perhaps the most common reason a defendant does not testify is that he perceives that the substance of his testimony will harm rather than help his defense.<sup>159</sup> Either the defendant is guilty and unable or unwilling to articulate any convincing alternative explanation for the prosecution's evidence, or he is innocent and suspects his exculpatory explanation will be disbelieved.<sup>160</sup>

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<sup>157</sup> A prosecutor, disbelieving or discounting the defendant's claim of involvement in an uncharged offense (particularly a relatively minor one), could attempt to remove the Fifth Amendment protection by providing "use and derivative-use immunity" for the uncharged offense. See *Kastigar v. United States*, 406 U.S. 441, 459 (1972).

<sup>158</sup> Cf. *People v. Lopez*, 84 Cal. Rptr. 2d 655, 657 (Cal. Ct. App. 1999) ("[W]here a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony.").

<sup>159</sup> *Tague*, *supra* note 38, at 19 ("Of those defendants who do not testify, the bulk remain silent, one suspects, because they would condemn themselves by testifying truthfully.").

<sup>160</sup> In either circumstance, the testimony will likely reduce the chances for acquittal. See *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995) ("[A]dverse inferences will inevitably be drawn from disbelief of a defendant's trial testimony . . ."); James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and*

For these defendants, the import of trial silence strongly correlates with the adverse inference formerly permitted under California law: the defendant's failure to testify tends "to indicate the truth of [the prosecution's] evidence" as to "any evidence or facts . . . which the defendant can reasonably be expected to deny or explain because of facts within his knowledge."<sup>161</sup> Absent bizarre circumstances (e.g., amnesia), the defendant knows more about his guilt or innocence than any other witness and has himself concluded that if the jury hears his testimony, the jurors are more likely to credit the prosecution's case.<sup>162</sup> An inference paralleling this sentiment is neither unfair nor unwarranted.<sup>163</sup> It is, in the parlance of *Griffin*, natural and irresistible.<sup>164</sup>

This is not to say that the defendant who remains silent to avoid testifying to facts that support the prosecution (or to facts that are so unbelievable as to have the same effect) is not penalized by adverse comment. He assuredly is. It is also clear that this penalty sounds in the Fifth Amendment as the defendant is silent to avoid becoming a witness against himself. Nevertheless, the defendant is not penalized *unfairly*. An adverse inference from silence follows from the defendant's own implicit acknowledgement that his testimony will strengthen rather than rebut the prosecution evidence. In addition, the defendant suffers a virtually identical penalty simply by refusing to testify, due to the likelihood that the jury will view the refusal as evidence of guilt.<sup>165</sup> As explained in Part II.C, *supra*,

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*Politics*, 44 STAN. L. REV. 1301, 1354–55 (1992) (contending that "[a]ny suggestion of perjury in any fashion connected to the defense is powerful affirmative proof" and noting that "[c]lassic jury instructions" invite the factfinder to use perjury, falsification of evidence and the like as evidence of consciousness of guilt, i.e., affirmative evidence of guilt).

<sup>161</sup> *Griffin v. California*, 380 U.S. 609, 610 (1965).

<sup>162</sup> Cf. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1936–37 & n.101 (1992) (recognizing defendant's information advantage in plea bargaining context: "D [the defendant] has a major piece of information that P [the prosecutor] does not: D knows whether or not he is guilty").

<sup>163</sup> Cf. *Portuondo v. Agard*, 529 U.S. 61, 67–68 (2000) (holding that prosecutor may comment on a defendant's ability to tailor testimony to that of other witnesses and explaining that a contrary principle "differs from what we adopted in *Griffin* in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible").

<sup>164</sup> *Griffin*, 380 U.S. at 614.

<sup>165</sup> *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) (noting that the "penalty . . . exacted . . . by adverse comment on the defendant's silence" may "be just as severe when there is no adverse comment, but when the jury is left to roam at large with

comment on that inference, while marginally increasing its sting, is only a mild and incremental penalty.<sup>166</sup> Consequently, for this category of defendants, adverse comment cannot be deemed such a severe penalty that it rivals the compulsion forbidden by the Fifth Amendment.

## *2. Defendants Who Decline to Testify to Hide Their Demeanor*

Jurists and commentators arguing in support of the constitutional prohibition of adverse comment often invoke a subset of hypothetical defendants who decline to testify due to poor oral presentation skills, excessive nervousness or anxiety—traits that a jury could mistakenly equate with either consciousness of guilt or general criminality.<sup>167</sup> While the existence of such defendants might support a statutory prohibition of adverse comment, it does not warrant a constitutional prohibition. Adverse comment on a refusal to testify that is occasioned by disinclination to disclose one's own "unappealing countenance,"<sup>168</sup> does not give rise to either significant unfairness, or Fifth Amendment protection.

First, the requisite unfairness is minimized because the adverse inference can be rebutted. Where applicable, defense counsel can respond to any comment on a defendant's silence through evidence and argument regarding the defendant's lack of formal education, below average intelligence, poor public speaking skills, mental disorders and the like that might explain the defendant's silence despite his professed innocence. (To the extent the prosecutor wants to avoid such argument and evidence, she may abstain from adverse comment.) If requested, a jury instruction would be in order, repeating the eloquent language of Justice Field ("It is not every one who can safely venture on the witness stand, though entirely innocent of the charge

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only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt").

<sup>166</sup> See *supra* Part II.C.

<sup>167</sup> See, e.g., *Griffin*, 380 U.S. at 613; Schulhofer, *supra* note 6, at 330 (arguing that some innocent defendants may be better off not testifying because, inter alia, they "may look sleazy" have a "vague memory" of events or be "inarticulate, nervous or easily intimidated").

<sup>168</sup> *Portuondo*, 529 U.S. at 85 (Ginsburg, with Souter, JJ., dissenting) (positing, as potential explanation for "why an innocent defendant might not want to testify" that "he has an unappealing countenance"); see Tague, *supra* note 38, at 19 ("The Court's image of a befuddled, cowering defendant seems quaint . . . and unconvincing.").



against him . . .").<sup>169</sup> The competing explanations for the defendant's silence, and an instruction endorsing those possible explanations, can be placed before the jurors who would then decide whether the circumstances warrant an adverse inference.<sup>170</sup> This is, after all, how the criminal trial system usually treats disputed inferences—providing the jury with the evidence and arguments on both sides of the question and leaving the ultimate significance of the respective showings to the jurors.<sup>171</sup>

Second, a refusal to testify that is based on a witness's fear that his demeanor will incriminate him finds little support in Fifth Amendment doctrine. The Fifth Amendment prohibits compelling a person to be a "witness" against oneself. Construing the term "witness," the Supreme Court has interpreted the privilege to protect "an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . ."<sup>172</sup> "[I]n order to be

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<sup>169</sup> *Wilson*, 149 U.S. at 66; see also *Griffin*, 380 U.S. at 623 n.10 (Stewart, J., dissenting) (noting the possibility that a defendant could request an instruction "which would have brought out other possible reasons which might have influenced the defendant's decision not to become a witness").

<sup>170</sup> A similar battle of inferences would be created where the defendant purports to have tactically elected to remain silent based on the perceived weakness of the prosecution's case in chief.

<sup>171</sup> *Sampsell-Jones*, *supra* note 9, at 1353 (arguing for abolition of *Griffin* and noting that, as with other inferences, "[t]he strength of the opposing arguments" regarding an inference of guilt from silence "will vary depending on the circumstances of the case, and the jury can decide which is more persuasive"). For example, the courts permit the prosecution to introduce evidence of a defendant's flight following a crime even though there are often innocent explanations for flight. See *Allen v. United States*, 164 U.S. 492, 499 (1896) ("[T]he law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt."); *United States v. Zanghi*, 189 F.3d 71, 83 (1st Cir. 1999) ("Evidence of an accused's flight may be admitted at trial as indicative of a guilty mind, so long as there is an adequate factual predicate for the inference that the defendant's movement was indicative of a guilty conscience, and not normal travel."); *Snyder*, *supra* note 9, at 298–99 (recognizing that suggestion that inference from silence is impermissible because ambiguous is inconsistent with permitting inferences to be drawn in other ambiguous contexts, such as with flight); see also *Hunter*, *supra* note 11, at 301 (noting same analogy to flight as well as inference from other "suspicious activities").

<sup>172</sup> *Schmerber v. California*, 384 U.S. 757, 761 (1966); see also *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting same); *Fisher v. United States*, 425 U.S. 391, 408 (1976) ("[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating.").

testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself."<sup>173</sup>

The Supreme Court applied this limitation on the term "witness" in *Pennsylvania v. Muniz*, where it concluded that the prosecutor, in a drunk-driving prosecution, could introduce a videotape showing the defendant's slurred speech in response to police questioning, despite the absence of required *Miranda* warnings. The Court explained: "The physical inability to articulate words in a clear manner due to 'the lack of muscular coordination of his tongue and mouth,' is not itself a testimonial component of [the defendant's] responses to [the police officer's] introductory questions."<sup>174</sup> Such non-testimonial components of speech are not protected by the Fifth Amendment.<sup>175</sup>

The same reasoning should apply to a defendant's demeanor during trial testimony; compulsion to reveal one's rough or anxious demeanor, odd inflections or reliance on colloquialisms, is not prohibited by the Fifth Amendment.<sup>176</sup> Consequently, even if adverse comment is deemed to

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<sup>173</sup> *Doe v. United States*, 487 U.S. 201, 210, 218–19 (1988) (holding that government could compel criminal defendant to sign "consent directive" authorizing bank to disclose information relating to certain bank accounts because directive "is not testimonial in nature"); see also *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting same).

<sup>174</sup> *Muniz*, 496 U.S. at 590–91 (citation omitted); see *id.* at 592 ("Under *Schmerber* and its progeny, we agree . . . that any slurring of speech and other evidence of lack of muscular coordination revealed by *Muniz*'s responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses.").

<sup>175</sup> *Id.* at 590–92. In *United States v. Velarde-Gomez*, the Ninth Circuit cited *Muniz* for proposition that "'physical' and 'demeanor' evidence" are distinct from "'testimonial' evidence" and that "evidence of the former does not engender Fifth Amendment protection. Demeanor evidence often involves the admission of evidence concerning a defendant's 'slurr[ed] speech,' . . . 'apparent nervousness,' . . . or a defendant's demeanor during a polygraph test, even though the results may not be admissible." 269 F.3d 1023, 1030–31 (9th Cir. 2001) (citations omitted).

<sup>176</sup> In *Muniz*, the Court also held that the defendant's inability to state his birthday did constitute a testimonial response because incrimination followed "not just because of his delivery, but also because of his answer's content." *Muniz*, 496 U.S. at 592. The Court reached this conclusion by stating that the defendant, upon being asked the question, faced the cruel dilemma of self-accusation, perjury or contempt. *Id.* at 596–97 (concluding that a "suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic dilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation"). In the instant scenario, the defendant is not faced with the cruel dilemma

pressure a defendant to reveal an unappealing demeanor, that pressure does not implicate the Fifth Amendment.

### 3. *Defendants Who Do Not Testify to Avoid Implicating a Third Party or Embarrassing Themselves*

The Supreme Court has highlighted another type of defendant properly, in the Court's view, protected by the *Griffin* rule: defendants who, despite an ability to demonstrate their innocence, are unwilling to testify because they "prefer to risk a finding of guilt rather than being required to incriminate others whom they either love or fear."<sup>177</sup> With respect to these defendants, there is arguably the requisite unfairness for a finding of compulsion in that if adverse comment is permitted, a counterfactual and un rebuttable inference will be urged upon the jury as a consequence of their silence. Nevertheless, constitutional protection from adverse inferences is not warranted because no Fifth Amendment right is implicated.<sup>178</sup>

The Fifth Amendment protects a defendant from being forced to be a witness "against himself."<sup>179</sup> There is no right to decline to incriminate a *third party* and a person can be compelled to do so.<sup>180</sup> It necessarily follows that if a defendant can be compelled to incriminate a third party, comment

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because his answers themselves (unlike the answer in *Muniz*) do not constitute self-accusation. It is only the "delivery" of those answers that he believes will incriminate him. *Id.* at 592. In any event, to the extent difficult questions arise as to whether a certain form of demeanor is sufficiently substantive to be testimonial, these questions need not be resolved. Whether a refusal to testify is based on demeanor or the negative impact of substantive testimony, it is not protected under the unfair-penalty rationale set forth in this article.

<sup>177</sup> *Lakeside v. Oregon*, 435 U.S. 333, 344 n.2 (1978) (Stevens, J., dissenting); see *Carter v. Kentucky*, 450 U.S. 288, 300 n.15 (1981) (emphasizing among the "many reasons unrelated to guilt or innocence for declining to testify" a hypothetical defendant's "reluctance to 'incriminate others whom [defendants] either love or fear'" and citing Justice Stevens's dissent in *Lakeside*).

<sup>178</sup> *McGautha v. California*, 402 U.S. 183, 213 (1971) ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.").

<sup>179</sup> U.S. CONST. amend. V; see *Roberts v. United States*, 445 U.S. 552, 560 n.7 (1980) ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give.").

<sup>180</sup> *Brown v. Walker*, 161 U.S. 591, 597 (1896) (explaining that the "object" of the Fifth Amendment is "to protect the witness himself and no one else"); Schulhofer, *supra* note 6, at 315 ("Obviously the privilege does not permit a witness to withhold testimony that might incriminate others.").

that merely pressures him to do so (or penalizes him for failing to do so) cannot be prohibited.

Similar analysis applies to a defendant who, while able to rebut the prosecution's evidence, declines to testify to avoid disclosing information that will "disgrace him or bring him into disrepute."<sup>181</sup> For example, an innocent defendant might decline to testify in a murder prosecution to conceal an affair with the victim. The defendant is clearly placed in a difficult position, but this circumstance does not invoke the protections of the Fifth Amendment; the Fifth Amendment "protects against 'compelled self-incrimination, not (the disclosure of) private information.'"<sup>182</sup>

In sum, adverse comment may pressure an embarrassed, loyal or fearful defendant to reveal information he would prefer to keep secret, but this pressure has no constitutional dimension. "Unless his silence is protected by the privilege against self-incrimination . . . the criminal defendant no less than any other citizen is obliged to assist the authorities."<sup>183</sup>

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<sup>181</sup> *United States v. Gecas*, 120 F.3d 1419, 1428 (11th Cir. 1997); *see* *Portuondo v. Agard*, 529 U.S. 61, 85 (2000) (Ginsburg, with Souter, JJ., dissenting) (positing, as potential explanation for "why an innocent defendant might not want to testify" that "he worries that cross-examination will drag into public view prior conduct that, though not unlawful, is deeply embarrassing").

<sup>182</sup> *Gecas*, 120 F.3d at 1428 ("The [self-incrimination] Clause does not protect a witness against the disclosure of facts which might 'disgrace him or bring him into disrepute.'" (quoting *Brown v. Walker*, 161 U.S. 591, 598 (1896))); *see* *Fisher v. United States*, 425 U.S. 391, 401 (1976) (explaining that the Fifth Amendment is not "a general protector of privacy," but rather "protects against 'compelled self-incrimination, not (the disclosure of) private information'"); Schulhofer, *supra* note 6, at 313 ("[T]he general rule is that the government can legitimately compel witnesses to say what they know, subject only to narrowly limited privileges and exceptions."); *cf. In re Cont'l Ill. Secs. Litig.*, 732 F.2d 1302, 1315 (7th Cir. 1984) ("[T]here is no general privilege, analogous to the fifth amendment's protection against self-incrimination, that protects against disclosure of information that may lead to civil liability.").

It is possible that a defendant could decline to testify to reveal some non-criminal but nonetheless prejudicial information that could be deemed analogous to the admission of a prior crime. Arguably, this circumstance would activate the concerns elicited in Part IV.A.1, *supra*, discussing defendants who do not testify to avoid revealing a criminal record.

<sup>183</sup> *Roberts v. United States*, 445 U.S. 552, 558 (1980); *cf. Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (recognizing that probationer asked questions that might incriminate him "was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination").

### C. Can Courts Distinguish Various Types of Defendants?

The discussion in the preceding sections suggests that a Fifth Amendment penalty rationale for prohibiting adverse comment properly applies only to a distinct subset of defendants who decline to testify. For this subset of defendants, *Griffin*'s constitutional prohibition of adverse comment survives doctrinal scrutiny and can be applied without objection. For all other defendants, however, a Fifth Amendment penalty rationale provides little support for a prohibition of adverse comment. These defendants receive a constitutional windfall when adverse comment is precluded. Depending on the defendant's reasons for declining to testify in a particular case, courts are: (i) applying a constitutional doctrine justified (if at all) by concerns about fairness to prohibit comment that is perfectly fair; or (ii) protecting refusals to testify that are simply not cognizable under the Fifth Amendment.

One potential defense of the existing blanket prohibition of adverse comment is that the courts are, as a practical matter, simply incapable of distinguishing among defendants' motivations for silence. A blanket prohibition could thus be justified as a *Miranda*-like prophylactic rule, providing necessary "breathing space" to an otherwise vulnerable constitutional right.<sup>184</sup>

The problem with the breathing space justification is twofold. First, the justification has not been offered by the courts. It would be scandalous (doctrinally speaking) if a jurisprudence that "has become an essential feature of our legal tradition"<sup>185</sup> has persisted for over forty years based upon complete artifice. If the prohibition of adverse comment extends to all defendants, rather than some discrete minority for whom its protections are intended, solely for reasons of practicality, the Court should reveal this unfortunate reality. The prohibition may, like *Miranda* warnings, come to be accepted as a prophylactic rule, but it cannot be smuggled into the constitutional firmament in bad faith.

Second, the task of focusing the prohibition's protections on only those defendants to whom it should apply is hardly insurmountable.<sup>186</sup> Just as the trial court must make a threshold determination of admissibility with respect

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<sup>184</sup> Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 944 (2000) ("The privilege against self-incrimination, along with other constitutional guarantees, needs 'breathing space.'").

<sup>185</sup> *Mitchell v. United States*, 526 U.S. 314, 330 (1999).

<sup>186</sup> *Tague*, *supra* note 38, at 20 n.87 (suggesting that "[w]e might . . . require the defendant to explain why he chose not to testify, as a condition of barring judicial comment. In this way we would consider each defendant, not defendants as a class").

to other controversial inferences (e.g., an inference of guilt from flight),<sup>187</sup> it can do so in the context of an inference of guilt from silence.<sup>188</sup>

For purposes of this analysis, the inference from silence is helpfully characterized per *Griffin* as “in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify.”<sup>189</sup> The prosecution, as the proponent of the inference, should be tasked with making an initial showing that the defendant’s silence is probative of guilt. This showing can be made, in line with California’s pre-*Griffin* rule, by demonstrating that the defendant would be expected to respond to the prosecution’s evidence, if able. Substantial evidence that the defendant was present for the crime or came into possession of its proceeds or implements would carry this burden.<sup>190</sup>

Once the prosecution has carried its burden, the defense (if it sought to prohibit the inference) would have a burden of showing that the defendant’s silence is not, in fact, supportive of the veracity of the prosecution’s case. To do so, the defense must present an alternative explanation for the defendant’s silence—i.e., an explanation as to why the defendant, despite an ability to rebut the prosecution case, declines to do so. This showing would consist of two parts: (i) a rough proffer of the potentially exculpatory testimony the defendant would like to offer; and (ii) the identification of a motivation for the defendant’s silence that is cognizable under the Fifth Amendment. If a

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<sup>187</sup> See, e.g., *United States v. Atchley*, 474 F.3d 840, 853 (6th Cir. 2007) (setting forth “four-step analysis” governing district court’s determination of whether evidence of flight is admissible); *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) (same).

<sup>188</sup> *Bradley & Hoffman*, *supra* note 19, at 1281, 1286 (sketching out numerous potential reforms of the criminal justice system “as starting points for discussion” and suggesting that if prior conviction impeachment were abolished, the prosecutor should be able to comment adversely on the defendants’ refusal to testify “unless the defendant were able to satisfy the court that such silence was justified by some exceptional circumstance”); *Sampsell-Jones*, *supra* note 9, at 1357 (arguing that under a statutory regime, adverse comment should be prohibited in certain cases and “a judge should address the matter efficiently, before or during trial”); cf. *Bellin*, *supra* note 9, at 890–96 (proposing in limine procedure designed to allow trial courts to alter default rules so that defendants would be more likely to testify in particular cases).

<sup>189</sup> *Griffin v. California*, 380 U.S. 609, 613 (1965).

<sup>190</sup> This is consistent with R. Kent Greenawalt’s observation on moral grounds that “the right to make inquiry of suspects is strongest when substantial independent evidence of guilt exists.” Greenawalt, *supra* note 9, at 59; see also *Barnes v. United States*, 412 U.S. 837, 844 n.8 (1973) (emphasizing trial court’s “discretion in determining whether there is sufficient evidence to go to the jury and in charging the jury” in upholding instruction that the jury could draw an adverse inference from the unexplained possession of stolen checks).

defendant can make this showing, the trial court could preclude an adverse inference (and any adverse comment inviting such an inference) under the Fifth Amendment penalty rationale discussed in Part III, *supra*.

For the defense, the primary means of carrying its burden will be to demonstrate the existence of prejudicial prior convictions admissible only as impeachment. If the trial court deems the convictions inadmissible as impeachment or, alternately, admissible as substantive evidence (e.g., under Federal Rule of Evidence 404(b)),<sup>191</sup> the showing would be neutralized. (In a number of states, prior conviction impeachment is either not permitted or severely limited.)<sup>192</sup> Similarly, the prosecutor may stipulate to excluding the impeachment so as to preserve her ability to urge the jury to draw an adverse inference from the defendant's silence.

As discussed above, there is another explanation for silence that fits comfortably under the unfair penalty rationale: the fear of incriminating oneself in a crime other than the crime charged. Although this presumably rare circumstance would, when invoked, present the most difficult scenario for judges to unravel, it is perfectly analogous to a task already committed to trial courts.

Witnesses other than defendants often invoke a Fifth Amendment privilege when called to testify. A defendant's claim to be refraining from testifying so as to hide guilt of an uncharged crime can be analyzed in the same manner as any other witness's invocation of a Fifth Amendment privilege. In such circumstances,

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<sup>191</sup> Under Rule 404(b), evidence of prior criminal acts may be admissible when relevant for purposes other than as criminal propensity evidence, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). In addition, Federal Rules 413 and 414 allow prior crimes of child molestation or sexual assault to be utilized as propensity evidence in child molestation and sexual assault cases.

<sup>192</sup> Montana, Kansas and Hawaii essentially prohibit prior conviction impeachment of criminal defendants. See MONT. R. EVID. 609; KAN. STAT. ANN. § 60-421 (2008); HAW. R. EVID. 609. Pennsylvania, Alaska and West Virginia allow such impeachment only with respect to a narrow category of prior crimes involving dishonesty or false statement. See ALASKA R. EVID. 609; W. VA. R. EVID. 609; PA. R. EVID. 609. Pennsylvania employs an awkward formulation, prohibiting the defendant from being *asked* about prior crimes, but allowing the prosecution to introduce evidence of *crimen falsi* in its rebuttal case. See 42 PA. CONS. STAT. ANN. § 5918 (West 2000); *Commonwealth v. Garcia*, 712 A.2d 746, 748 (Pa. 1998) (emphasizing "legislative mandate that the defendant shall not be asked" about his prior crimes). For a concise summary of state evidentiary rules regarding prior conviction impeachment, see Blume, *supra* note 148, app. at 499-505.

a practice has developed whereby, outside the presence of the jury, the witness will allude in very general, circumstantial terms to the reasons why he feels he might be incriminated by answering a given question. The judge examines him only far enough to determine whether there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the danger might exist, the court must uphold the privilege . . . .<sup>193</sup>

Thus, just as the courts have never permitted a non-defendant witness final say in the matter of self-incrimination, the defendant would not be able to simply claim that possible incrimination of an uncharged crime motivates his refusal to testify (and thereby avoid adverse comment). The witnesses mere "say-so" does "not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer [or, as here, allow adverse comment] if 'it clearly appears to the court that he is mistaken.'"<sup>194</sup>

The fact that the scenarios in which the unfair penalty rationale applies are few and fairly discrete will significantly assist the courts in determining which defendants are truly entitled to Fifth Amendment protection from adverse inferences. It is only when a defendant declines to testify to avoid impeachment with prior convictions or to conceal an uncharged crime that the Fifth Amendment penalty rationale properly applies.<sup>195</sup> Further, it will be

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<sup>193</sup> United States v. Melchor Moreno, 536 F.2d 1042, 1046-47 (5th Cir. 1976).

<sup>194</sup> Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (citations omitted); see *Melchor Moreno*, 536 F.2d at 1046-47 ("The courts cannot accept Fifth Amendment claims at face value, because that would allow witnesses to assert the privilege where the risk of self-incrimination was remote or even nonexistent, thus obstructing the functions of the courts. The applicability of the privilege is ultimately a matter for the court to decide."); cf. United States v. Apfelbaum, 445 U.S. 115, 128 (1980) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." (quoting *Rogers v. United States*, 340 U.S. 367, 374 (1951))).

In addition, because the analysis is question-specific, *Melchor Moreno*, 536 F.2d at 1049, a trial court could conclude that the defendant has a legitimate reason to avoid answering certain questions, but that those questions are tangential to the issues in the case. The court could then require the defendant to either testify or suffer an adverse inference with the understanding that no examination regarding the potentially incriminating topic would be permitted.

<sup>195</sup> To the extent the defendant candidly acknowledges that his refusal to testify stems from a combination of reasons, the trial court would have to analyze the relative weight of each of the factors, determining whether the protected reason (e.g., prior



difficult for defendants to falsely claim that such reasons motivate their desire to testify. First, as already noted, the trial court can conduct an inquiry into the facial plausibility of the defendant's contention (i.e., the claim that he would testify in the absence of the prior conviction impeachment or possible incrimination). If the defendant cannot pass this hurdle, the trial court should allow adverse comment. Second, if a prosecutor feels that the defense is employing a Fifth Amendment rationale as a ruse to avoid an adverse inference, she can simply stipulate to excluding the complained of impeachment (or provide immunity for the uncharged offense). If the defendant still does not testify, adverse comment and a resulting adverse inference will not be precluded by the Fifth Amendment.

### CONCLUSION

There will likely be resistance to altering the constitutional rule prohibiting adverse comment on defendant silence in criminal trials, a rule that the Supreme Court has endorsed as "an essential feature of our legal tradition."<sup>196</sup> Nevertheless, the rule must be supported by a coherent doctrinal rationale to be deserving of its "essential feature" status. No such rationale currently exists.

Ignoring the doctrinal shortcomings of the existing prohibition of adverse comment is no solution. Over the long run, the Supreme Court, with its shifting majorities, cannot be expected to preclude adverse comment in state and federal trials merely because such comment is, as many commentators believe, bad policy. As a practical matter, different majorities are likely to come to different conclusions about the policy merits of the prohibition. More fundamentally, judicial legitimacy suffers when a constitutional rule that alters the course of countless criminal trials is not supported by a coherent, text-based, doctrinal rationale.<sup>197</sup>

Those who object to the proposed narrowing of the constitutional prohibition of adverse comment should come forward with an alternative doctrinal justification that supports the continued broad application of the

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convictions or an uncharged crime) is, in fact, a substantial factor in the defendant's decision not to testify.

<sup>196</sup> *Mitchell v. United States*, 526 U.S. 314, 330 (1999) ("[T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.").

<sup>197</sup> See Ayer, *supra* note 6, at 870–71 (arguing that "[j]udicial honesty and the integrity of the Constitution" demand that "*Griffin* . . . be rejected as without basis in the fifth amendment").

prohibition. This justification must explain how a defendant who declines to testify because he perceives that his testimony will support the prosecution case is so severely penalized by adverse comment that he is, in effect, compelled to testify. In addition, the justification will need to explain why a defendant who declines to testify for reasons that are not protected by the Fifth Amendment, such as a desire to protect a third party, should be protected by a prohibition based in that amendment. Absent a robust justification along these lines, the constitutional prohibition of adverse comment will remain in a precarious (and essentially illegitimate) position as "a rule in search of a reason."<sup>198</sup>

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<sup>198</sup> *Id.* at 869.